No. 95-346

(14)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT CHARLES W. ARLT, SR.

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EDITOR'S NOTE

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Question Presented

Whether a statutory in rem civil forfeiture of assets pursuant to 21 U.S.C § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitutes punishment to implicate the multiple punishment prong of the Double Jeopardy Clause when it is conducted in a separately docketed proceedings and the probable cause for the forfeiture is precisely the same conduct and violations as charged in the criminal indictment and prosecution.

Parties to the Proceedings

The petitioner is the United States of America. The respondents are Charles Wesley Arlt, Sr., James Wren, Payback Mines, and the defendants are properties listed in the caption of the governments's notice of motion and motion for summary judgement, Respondents' Appendix, infra, 1a-2a.

TABLE OF CONTENTS

Opinion below 1

Jurisdiction 1

Constitutional and statutory provisions involved 1

Statement of the case 2

Reasons why the petition should be granted, and the decision affirmed 7

Conclusion 39

Appendix A 1a

Appendix B 30a

Appendix C 48a

Appendix D 58a

Appendix E 71a

Appendix F 86a

Appendix G 90a

Appendix H 91a

Appendix I 107a

Appendix J 142a

Appendix K 149a

TABLE OF AUTHORITIES

Cases:

Abbate v. United States, 359 U.S. 187 (1959) 36

Austin v. United States, 113 S.Ct. 2801 (1993) . . . . . passim

Blockburger v. United States, 284 U.S. 299 (1932) . 16, 17, 22, 23

Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) . . . . . passim

Ex parte Lange, 18 Wall. 163 (1874) 28

Green v. United States, 355 U.S. 184 5

Cases continued:

Harmelin v. Michigan, 111 S.Ct. 2680 (1991) 13

In Re Moffit, Zwerling & Zemler, P.C., 875 F.Supp. 1152 (E.D.Va) 33

Jeffers v. United States, 432 U.S. 137 (1977) 23

Jones v. Drug Enforcement Administration,
819 F.Supp. 698 (M.D.Tenn. 1993) 39

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 11

S.E.C. v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994) 21, 22

United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995) 40

United States v. Borromeo, 995 F.2d 23, amended on reh'g
1 F.3d 219 (4th Cir. 1993) 22

United States v. Carson, 52 F.3d 1173 (2nd Cir. 1995) . . . 21, 22

United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) . . . 7, 10

United States v. Currency, In the Amount of $150,660.00
980 F.2d 1200 (8th Cir. 1992) 39

United States v. $405,089.23 In U.S. Currency, 33 F.3d 1210
(9th Cir. 1994) . . . . . passim

United States v. G & P Automotive, 66 F.3d 483 (2nd Cir. 1995) 39

United States v. Halpe, 435 U.S. 490 (1984) . . . . . passim

United States v. James Daniel Good Property, 114 S.Ct. 492 (1993) 13, 36

United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987) . . 14

United States v. Millan, 2 F.3d 17 (2nd Cir. 1993) 19

United States v. Morgan, 51 F.3d 1105 (2nd Cir. 1995) 22

United States v. 92 Buena Vista Ave., Rumson, N.J.
113 S.Ct. 1126 (1993) 26, 33

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 11, 19, 31

United States v. $145,139.00 In U.S. Currency,
18 F.3d 73 (2nd Cir. 1994) 19

United States v. $191,910.00 In U.S. Currency,
16 F.3d 1051 (9th Cir. 1994) 13

United States v. One Single Family Residence,
13 F.3d 1439 (11th Cir. 1994) 19

Cases continued:

U.S. v. One Parcel of Real Estate Located at 13143 S.W., 872 F.Supp 968 (S.D. Fla. 1994) 12

United States v. Rhodes, 62 F.3d 1449 (D.C. Cir. 1995) 40

United States v. Salinas, 65 F.3d 551 (6th Cir. 1995) . . . 22, 23

United States v. That Certain Real Property, 798 F.Supp. 1540 (N.D. Ala. 1992) 39

United States v. $31,990 In United Staes Currency, 982 F.2d 851 (2nd Cir. 1993) 36

United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) . . . passim

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995) . . . 27, 40

United States v. U.S. Coin & Currency, 91 S.Ct. 1041 (1970) . . 40

United States v. Ward, 448 U.S. 242 (1989) 11

Witte v. United States, 115 S.Ct. 2199 (1995) 22, 23

Wood v. United States, 863 F.2d 417 (5th Cir. 1989) 20, 23

Constitution, statutes and rule:

U.S. Constitution:

Amendment III 35

Amendment V . . . . . passim

Amendment VIII . . . . . passim

18 U.S.C. § 371 10

18 U.S.C. § 924 11

18 U.S.C. § 981 (a)(1)(A) . . . . . passim

18 U.S.C. § 982 12

18 U.S.C. § 1955 19

18 U.S.C. § 1956(a)(1) 2

18 U.S.C. § 3554 . . . . . 10, 14

19 U.S.C. § 1616 38

21 U.S.C. § 801 17

Constitution, statutes and rule continued:

21 U.S.C. § 846 . . . . . 10, 23

21 U.S.C. § 853 . . . . . passim

21 U.S.C. § 853(a) 32

21 U.S.C. § 863)c) 32

21 U.S.C. § 881(a) . . . . . passim

21 U.S.C. § 881(a)(1) 31

21 U.S.C. § 881(a)(2) 32

21 U.S.C. § 881(a)(3) 32

21 U.S.C. § 881(a)(4) . . . . . passim

21 U.S.C. § 881(a)(5) 32

21 U.S.C. § 881(a)(6) . . . . . passim

21 U.S.C. § 881(a)(7) . . . . . passim

21 U.S.C. § 881(a)(8) 33

21 U.S.C. § 881(a)(9) 33

21 U.S.C. § 881(a)(10) 33

21 U.S.C. § 881(a)(11) 33

21 U.S.C. § 881(f)(1) 33

28 U.S.C. § 524 38

28 U.S.C. § 1254(1) 2

Other Authorities:

Black's Law Dictionary, Sixth Edition 29

Prosecution and Defense of Forfeiture Cases by David Smith . . 39

Prosser & Keeton on the Law of Torts, (5th Edition 1984) . . . 33

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT CHARLES W. ARLT, SR.

The respondent, Charles W. Arlt, Sr., claimant-appellant in the case below, opposes the grounds of the petition for writ of certiorari, and instead suggest that certiorari be granted to review and affirm the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet.App. 1a-23a)[1] is reported at 33 F.3d 1210 (9th Circ. 1994). An order amending the opinion of the court of appeals (Pet.App. 24a-29a) is reported at 56 F.3d 41, together with a dissent from the denial of rehearing en banc.

JURISDICTION

The judgement of the court of appeals was entered on September 6, 1994. (Pet.App. 1a-23a). A petition for rehearing was denied, and the opinion amended, on May 30, 1995, (Pet.App. 24a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Arlt adopts the petitioner's "Constitutional and Statutory Provisions Involved." Pet. 2. The provisions of 18 U.S.C. §§ 982 and 3554, and 21 U.S.C. § 853, for criminal forfeiture as set forth in the appendix. Resp. App. 142a-148a.

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[1]"Pet.App." & "Resp.App.", refer to the Petitioner's and Respondent's Appendixes respectively. "Pet.", refers to a Petition page indicated.

STATEMENT OF THE CASE

1. On March 29, 1991, claimants-respondents James Eli Wren ("Wren") and Charles Wesley Arlt ("Arlt") were arrested and have remained incarcerated. On June 12, 1991, respondents were indicted by the government and charged in count one of conspiracy to manufacture methamphetamine [21 U.S.C. § 846], in count two of conspiracy to launder money [18 U.S.C. § 371], and counts three to twenty-two of money laundering [18 U.S.C. § 1956(a)(1)]. Pet.App. 79a-105a.

2. On June 17, 1991, the same plaintiff filed a civil forfeiture complaint against the defendant properties listed in the caption (hereinafter the "properties"). The civil complaint alleged the same conduct and criminal violations set forth in the criminal indictment against Wren, Arlt and others. The government invoked in rem forfeiture statutes § 881(a)(6) and 18 U.S.C. §981(a)(1)(A) in the civil complaint. Petitioner has had possession of the properties since they were sized between July 3 and July 25, 1991.

On March 27, 1992, respondents Arlt, Wren, and others were found guilty of the indictment charges. Pet.App. 106a-108a. On December 4, 1992, while Arlt and Wren were serving their sentences in prison, the government filed its motion for summary judgement in the forfeiture action. Resp.App. 1a-29a. Pet.App. 55a-75a. The government's "uncontroverted facts and conclusion of law" established its probable cause burden by using the criminal indictment, prosecution, judgement, commitment, and convictions of Arlt and Wren as the grounds for summary judgement in the civil proceedings. Pet.App. 55a-75a.

On January 26, 1993, respondents Arlt and Wren, in pro se, opposed the government's motion for summary judgement by vigorously disputing the government's alleged "uncontroverted facts" (Resp.App. 48a-54a. Arlt and Wren showed that none of the properties were connected to an actual illegal act and they were not the proceeds of drugs, nor used to or intended to facilitate a drug activity. Respondents showed that they had permission from the Drug Enforcement Administration to purchase hydriodic acid from a factory for use in Respondents' gold-leaching solution for mining. Respondents showed that they had filed or caused to be filed a proper Currency Transactions Report and IRS 1099 form for every cash transaction in the complaint requiring form. Resp.App. 43a. Respondents showed that all of the cash transactions were legal in themselves, and that it was the government which was imputing illegalities to respondents' normal business transactions of buying and reselling mining

chemical. Resp.App. 31a-52. Respondents pointed out to the court that no drugs were ever found with them, no customers or suppliers testified against them, and no alleged "meth lab" was ever located at the Respondents' mining location in Daggett, California, or Osceola, Nevada or elsewhere. Resp. App. 31a-34a, 36a-47a, 48a-56a.

On March 23, 1993, respondents Arlt and Wren moved to strike the erroneous portions of the government's reply to claimants' opposition to motion for summary judgement. Resp.App. 58a-70a. Claimant's declaration and exhibits demonstrated a legal source of the vehicles, boat, airplane, personal property, silver bars, and money in several accounts. Respondents demonstrated the legal procedures they used when making chemical orders or cash purchases, and contended that use of cash is normal and not per se proof of mysterious drug activity. Resp.App. 49a-50a. Respondents demonstrated that there were no reliable witness to any illegal activity by claimants Arlt and Wren. Resp.App. 50a, 58a-70a.

The only fact not in dispute was that the government met its burden of proof of the probable cause for forfeiture based on the criminal indictment, prosecution, and convictions of respondents Arlt and Wren. Pet.App. 63a, 64a-69a; Resp.App. 58a-69a.

On April 1, 1993, the district court granted the government's motion for summary judgement and adopted in full the government's allegations in its "uncontroverted facts and conclusions of law," which incorporated the indictment and criminal prosecution for probable cause. Pet.App. 75a-78a.

On April 9, 1993, respondents Arlt and Wren filed a motion for reconsideration of the judgement of forfeiture, it was file-stamped on April 16, 1993. Resp.App. 71a. Respondents vigorously disputed the government's "uncontroverted" facts that any illegal acts were involved or connected to the properties or that "proceeds" were involved. Resp.App. 71a-80a.

The district court denied the respondent's motion for reconsideration on May 11, 1993, (Resp.App. 90a), and then respondents filed a timely notice of appeal on June 15, 1993.

On October 1, 1993, on direct appeal, Arlt and Wren requested that (1) the judgment of forfeiture be reversed in light of the rulings of the United States Supreme Court that forfeiture of properties alleged as instrumentalities of drug law violations is a monetary punishment, and as such, it was subjected to the limitations of the excessive fines and proportionality principles of the

Eighth Amendment of the United States Constitution (Resp.App. 94-99a); (2) the forfeiture judgement be reversed because, in the context of multiple punishments and successive prosecutions, the Double Jeopardy Clause applies to a monetary punishment in civil drug forfeitures of alleged conveyances and instrumentalities whenever the forfeiture is used in any way to punish the owner of the property (Resp.App. 99a-101a); and (3) that the district court in California had not acquired jurisdiction of the res to seize and forfeit defendant property (a shrimp boat) not in the district (being in Mississippi). Resp.App. 101a-102a.

The government had full opportunity to argue against each of the respondents' issues in its appellee answer brief, and it did so. Resp.App. 107a-114a.

The government's appellee brief from page 2 to 21 (Resp.App. 112a-130a) reargued its contention in the forfeiture motion for summary judgement, uncontested facts and conclusion of law, and indictment. The government candidly and frequently admitted that the probable cause burden for forfeiture was met by Arlt's and Wren's criminal indictment, prosecution and convictions for the violations and conduct underlying this forfeiture complaint. Resp.App. 112a-137a. However, the government argued that Arlt and Wren were collaterally estopped from denying that they laundered narcotics proceeds; that forfeiture does not violate the Double Jeopardy Clause of the Fifth Amendment,[2] and that claimants' waived any jurisdiction defense because the seizures and forfeitures were within the court's jurisdiction. Resp.App. 137a-139a.

On September 6, 1994, the Ninth Circuit panel ruled that the claimants' multiple punishment argument was correct; that multiple punishment occurred when a civil forfeiture of property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. §

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[2] Citing United States v. Halper, 490 U.S. 435 (1989), Respondents' double punishment issue was presented concisely in about two pages since the facts of this case were undisputed that the government conducted a criminal prosecution and then based the separate civil forfeiture probable cause precisely upon the same criminal conviction. The only issue remaining was whether the relevant in rem statutes elected by the government were mean as "punishment." Austin v. United States, 113 S.Ct. 2801 (1933) appeared controlling for 21 U.S.C. §881(a)(4)(7) and (6) in determining that the statutes involved were intended by Congress to deter and punish. The government's brief answered the claim in about two pages of its 29 page brief. It could have expounded much more on the issue, but waived the opportunity. Resp. App. 135a-137a.

981(a)(1) is based on the same conduct as the claimants' criminal indictment and prosecution. Thus, the multiple punishment prong of the Double Jeopardy Clause has been violated. Pet.App. 1a-23a. The panel did not reach the merits of the respondents; other claims, but stated in 33 f.3d at 1215, n.3. Pet. App.5

> "Although the claimants relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden the government relies almost exclusively on Arlt's and Wren criminal conviction. Because these convictions were not obtained until <u>after</u> the institution of the forfeiture action, it may not do so." (Emphasis in the original.)

See also 33F.3d. at 1220, n.11. Pet.App. 18a.

The decision showed that the government invited this problem for itself in order to "obtain a significant advantage:"

> "[I]f it succeeded in the criminal case it could obtain summary judgement based on the conviction (assuming that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standard applicable in civil proceeds applied. See 1 David B. <u>Smith, Prosecution and Defense of Forfeiture Case</u>, ¶ 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government;s advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated, manipulated strategy heightens, rather than diminishes, the concern that the government is forcing an individual to "run the gantlet" more than once. <u>Green</u>, 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single coordinated, prosecution.'"

33 F.3d at 1216-17; Pet.App. 9a-10a.

In a footnote, the panel noted that to condone such prosecutorial manipulation, when the government has the option of criminal forfeiture, "would be encouraging one of the worst abuses of prosecutorial power--the government's coordinated use of multiple proceedings to harass or exhaust particular defendants."[3] 33 f.3d at 1217, n.6; Pet.App. 10a, n.6.

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[3] On December 1, 1994, the same panel reversed Arlt's convictions and remanded the case for a new trial when it found Arlt's Sixth Amendment right to self representation was violated. Recently, before Arlt's new trial, the government superseded its indictment against Arlt with a new criminal forfeiture count, 21 U.S.C. § 853, for the exact same properties involved in the instant civil forfeiture judgement which was ordered to be dismissed. Resp.App. 149a-183a. All other charges on Arlt's new indictment are the same, but the new criminal forfeiture count indicts that the government could have brought the forfeiture by indictment the first time. The defendant properties in this case were seized by warrant upon an affidavit by IRS agent Mullen who suspected the properties were obtained in violation of drug laws. Although the

The Ninth Circuit panel expressly disagreed with the Second and Eleventh Circuit cases which were decided prior to Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994). These two circuits held that cases like the instant one did not constitute separate proceedings for double jeopardy purposes when there was criminal prosecution and a "parallel" civil forfeiture proceeding on the same violations. The Ninth Circuit stated "we believed that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent and common sense." 33F.3d at 1216. Pet.App. 7a-8a.

It should be noted that the Ninth Circuit stated that the government's own pleading admitted that this forfeiture was based on the prior criminal indictment and conviction. "We have little difficulty in determining that this civil forfeiture proceeding constitutes a separate 'proceeding' from the prosecution, which resulted in a claimants' conviction." Id. The panel noted that the government could use criminal forfeiture statutes in this case pursuant to 18 U.S.C. §§ 982 and 3554, and 21 U.S.C. § 853. Id. See Resp.App. 142a-149a.

The panel noted that the government had argued vigorously in the district court that Title 18 U.S.C. § 981(a)(1)(A) is not limited to the same proceeds of illegal activity and that it continued to rely on that statute in defending the district court's order of forfeiture. Therefore, the panel would not permit the government to suddenly now claim that the case involves only the forfeiture of illegal proceeds. 33 F.3d 1222, n.12. Pet.App. 21a, n.12.

The panel concluded that the decision in Austin will have a significant

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IRS seized the properties, U.S. Attorney sought the forfeiture. Having lost the civil properties in this case, the IRS then imposed notices of deficiencies based on the criminal indictment and prosecution. If Arlt prevails at the forthcoming new trial and criminal forfeiture, the IRS could claim the property for taxes since they have disagreed with Arlt's tax returns. It would appear that the criminal forfeiture count in the 1995 superseding indictment of Arlt is a dual proceeding upon the same cause of action as this decision on petition for writ of certiorari. The criminal forfeiture and ITS new tax claim on the property, based on the same conduct, were brought in 1995 after the government lost this civil forfeiture decision in 1994. They could be a paradigm of the "worst abuses of prosecutorial power" identified by the panel. 33 f.3d at 1217. n.6. Pet. App. 10a. Arlt must continue to "run the gantlet" again after obtaining a favorable judgement. Id. Arlt had timely complied with the IRS and had submitted appropriate tax returns upon notice of deficiency. The IRS and Arlt are attempting to settlement he amount due.

effect on cases like this one which involve a statutory in rem forfeiture action based on the same offense as the criminal prosecution. Moreover, the panel stated that the government will have to rely on criminal forfeiture to impose forfeiture and criminal punishment in one prosecution and "forego the favorable burden it would face in a civil forfeiture proceeding. Id.

3. The government sought rehearing, as stated in the petition, on October 14, 1994. The panel ordered responses from claimants which were filed February 22, 1995, and an Amicus Curiae brief in support of the decision was accepted from the National Association of Criminal Defense Lawyers. After review, the panel affirmed its opinion and amended it by holding that its categorical approach, determining that § 881(a)(6) was punishment, was compelled by decision in Kurth Ranch, supra. Pet.App. 25a.

A dissent was filed by seven judges who based their legal conclusion on a tabloid article in a local San Francisco newspaper which rumored that the Ninth Circuit's decision could free hundreds of drug dealers.[4] The dissenting judges' concern was that the decision was wrong because the Double Jeopardy Clause would protect a defendant from criminal prosecution after a "mere" seizure of illicit proceeds.

REASONS WHY THE PETITION SHOULD BE GRANTED, AND THE DECISION AFFIRMED

Respondent submits that petition should be granted and the decision below

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[4] The unresearched tabloid article printed on May 9, 1995, focused on two local drug dealers who received favorable rulings by the district court upon the decision, and some claims by prosecutors of alleged injustices to come. The article failed to reveals that prosecutors were aware of the Double Jeopardy implications since this Court's decision in United States v. Halper, 435 U.S. 490 (1989), and that any Double Jeopardy violations is the direct result of the prosecutors' strategic planning of civil and criminal punishments upon the defendants. As for the two local drug cases that received the favorable rulings, both were appealed by the government and are listed in footnote 6 in the petition at page 22. See United States v. Ailemen, No. 95-10233 & 95-10244; and United States v. Wilson, 95-10083. However, the government won the Ailemen case based on United States v. Cretacci, 62 F.3d 307 (9th Circ. 1995) where the judge who authored the instant decision held that uncontested forfeitures do not implicate the multiple punishment prong of the Double Jeopardy Clause. The Wilson case is still pending concerning the civil forfeiture of Mr. Wilson's expensive home prior to a criminal indictment for the same underlying offense. Thus, the government only has one loss in over a year since this decision, and they have appealed that case. There are not other known government losses to support the dissent's claim at this time.

affirmed for the following reasons: (1) Because the petitioner's Question Presented is missing the essential statutory predicates, review should be made on respondents' complete and accurate Question Presented which reflects the narrow statutory basis of the decision below; (2) Misstatements of fact and law in the petition have a bearing on what issues would properly be before the Court; (3) There is an appearance of conflict in a minority of the circuits on the Question Presented herein, but there is no conflict with this Court; (4) The Ninth Circuit fully considered and correctly decided the issues raised by the government below, based on the facts of this case and the precedents of this Court; and (5) It is important that the petition be granted and the decision below be affirmed because of the salutary effects and economic benefits to the administration of justice resulting from the decision.

1. Because the Petitioner's Question Presented is missing the essential statutory predicates, review should be made upon Respondents' complete and accurate Question Presented which reflects the narrow statutory basis of the decision below.

(a) The question actually presented at the Ninth Circuit was whether forfeiture pursuant to 18 U.S.C. §981(a)(1)(A) and 21 U.S.C. § 881(a)(6) constitutes "punishment" for purposes of the Double Jeopardy Clause. As noted herein, the government did not limit their claim to just "proceeds" as they now represent. The Ninth Circuit decision was governed by three decisions of this Court. United States v. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); Austin v. United States, 509 U.S.___, 125 L.Ed.2d 448, 113 S.Ct. 2801 (1993); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___. 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The issue decided was that the civil statutory in rem forfeiture of property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is categorically "punishment" based on the three part test in Austin v. United States, 113 S.Ct. 2801 (1993); and, that when the government based the civil in rem forfeiture of property on the probable cause of the owner's criminal indictment, prosecution and criminal conviction, the multiple punishment prong of the Double Jeopardy Clause prohibited a second civil punishment for the same conduct and criminal offense on the test in United States v., Halper, 490 U.S. 435 (1993).

(b) The facts in the records do not show that the res, which consisted of various assets, vehicles, silver bars, an airplane, a boat, and money in

bankers were "proceeds" of drug transactions as the government now claims. The Ninth Circuit stated:

> "If we were to look at the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds...[I]t would be most difficult, on the records before us, to conclude that the property consisted entirely of illegal proceeds."

33 F.3d at 1220, n.11; Pet.App. 18a; 33 F.3d at 1222, n.12; Pet.App. 21a.

The Ninth Circuit also noted that even if there various assets were "illegal proceeds," the government had made the choice to use certain civil in rem forfeiture statutes that impose punishment based on the Supreme Court's analysis and tests in Austin and Halper. The decision noted that the petitioner's argument "not only misconceives the legal standard established in Austin, but also misstates the scope of the statute involved." Pet.App. 18a.

The Ninth Circuit further noted that the government also sought forfeiture under the money laundering statute, 18 U.S.C. § 981(a)(1)(A), which applies to any property which is "involved in" an illegal money laundering transaction.

> "The government took pains to argue before the district court that property "involved in" a money laundering offense included more than the actual money that is laundered. See government's Memorandum of Contention of Fact and Law (CR46), at 17-20. Indeed, the government relied on a case which specifically **rejected** any limitations of § 981(a)(1)(A) to criminal proceeds."

United States v. $405,089.23, 33 F.3d at 12221-22. (Emphasis in the original, Pet.App. 21a.)

(c) The facts of the record below do not permit the formulation of the petitioner's partial Question Presented since the issue of "punishment" was not decided solely on the notice of "illegal proceeds" as now presented by petitioner. What is missing from the petitioner's Question Presented is the statutory basis for the forfeiture, i.e., the particular civil in rem forfeiture statute which would determine whether the scope of the particular statute is solely remedial in its purpose or it serves to punish and deter conduct, and whether Congress tied forfeiture to the commission of specific offenses. See Austin, supra. Without stating the particular civil in rem statute for the forfeiture judgement, the Question Presented in the petition is not reflective of the entire issue below or the facts of the record. Thus, review is necessary to clarify whether the use of the statutes involved constituted "punishment."

2. Misstatements of facts and law in the petition have a bearing on what issues would properly be before the Court.

(a) At Pet. 2, the petition has misstated the criminal charges in the

indictment upon which the subsequent instant forfeiture judgement was based. Respondents Arlt and Wren were not convicted of any substantive charges relating to methamphetamine, rather they were convicted of one general drug conspiracy count, 21 U.S.C. § 846, one conspiracy count to commit offenses against the United States, money laundering, 18 U.S.C. § 371, and eighteen (18) counts of money laundering instrument, 18 U.S.C. § 1956.

(b) At Pet. 4-5, contrary to petitioner's claim, the Ninth Circuit panel did not conclude that "all actions brought under the federal civil forfeiture statutes impose 'punishment' for double jeopardy purposes."[5] The panel only concluded that 21 U.S.C. § 881(a)(6) [and 18 U.S.C. § 981(a)(1)(A)] was categorically a punishment statute based on the decision in Austin v. United States, supra, concerning § 881(a)(4) and (7) which have nearly identical "innocent owner" language. Also, the panel looked at the requirements of the forfeiture statute as a whole, the history of forfeiture, and the legislative intent of § 881(a)(6) "to deter and punish." Thus, not "all actions" were covered by the decision as stated in the petition, rather only those in rem civil forfeiture actions under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) which the government has elected to specifically base this forfeiture.

Furthermore, the decision clearly stated that it was only dealing with the statutes as issue in this case, not all actions. "These [Austin] principles dictated that forfeiture under the statutes at issue in this case constitute 'punishment'." (Emphasis added.) Pet.App. 19a. "Thus, applying the principles set forth in Austin, we must conclude that the statutes relied upon by the government in this case operated at least in part to punish and deter." Pet.App. 20a. (Emphasis added.)

Likewise, the decision does not affect remedial forfeitures or other punitive forfeiture actions if the defendant consents. "Nor do we express any

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[5] There is no place in the decision identified by the petitioner to support the claim that the decision went to "all" civil forfeiture actions. Indeed, the author of the decision in the case, Judge Stephen Reinhardt, stated in the first sentence of his opinion in United States v. Cretacci, 62 F.3d 307, 308 (9th Cir. 1995) that "[w]e have recently held some civil forfeitures constitute 'punishment' for the purpose of the Double Jeopardy Clause. See United States v. $405,089.23, 33 F.3d 1210 (9th Circ.) amended on dial of reh'd 1995 W1 32186 (1995)." (Emphasis added). Thus, if the author of this case states that this decision only applies to some civil forfeitures, the petition's ground is unfounded.

view as to bifurcated proceedings before the same fact finder and presiding judicial officer." Pet.App. 8a-9a, n.4. The decision was a narrow ruling.

(c) At Pet. 8 and 10, the petition incorrectly states that the panel had "effectively overturned" United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The panel did not overturn 89 Firearms, rather it observed that this Court abandoned the Kennedy-Ward[6] test, on which the Supreme Court rested its double jeopardy holding in 89 Firearms, a test which focused heavily on the label Congress has attached to the particular section. Pet.App. 13a-14a. "If Congress indicated a preference that the proceeding be dominated 'civil' rather than 'criminal,' the Court would defer to the preference except in extraordinary circumstances." Pet.App. 13a. Consequently 89 Firearms was a "remedial" forfeiture to remove dangerous firearms from society's harm under 18 U.S.C. § 924(d).[7] The panel merely followed Halper's instructions that a sanction's civil or criminal label is not determinative of whether a sanction is punishment or not.

The Ninth Circuit decision actually states that "[i]n light of the decision in Austin, and applying the Halper test here, we find the conclusions inescapable that civil forfeitures under 21 U.S.C. § 881(a)(6) constitutes "punishment" which triggers the protection of the Double Jeopardy Clause." Pet.App. 16a. The court simply held that some civil forfeiture statutes are punitive (the Austin test) and that if those statutory in rem actions are based on precisely the same conduct as addressed in the claimants' criminal indictment and prosecution, the multiple punishment prong of the Double Jeopardy Clause will be implicated (the Halper test). The court expressly limited this decision to civil in rem forfeiture statutes 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) and found that based on the Austin test, those statutes do not serve solely remedial purposes, but were also intended to

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[6] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) and United States v. Ward, 488 U.S. 242 (1989).

[7] The decision i 89 Firearms is distinguishable from Halper on the ground that the Supreme Court found 18 U.S.C. § 924(d) to be remedial rather than punitive. Halper was found to apply to in rem forfeiture, such as 21 U.S.C. § 981(a)(4) and (a)(7) in Austin, where the statute is clearly punitive in purpose. Subsequent to the Supreme Court decision in 89 Firearms, Congress amended § 924(d) to provide that the firearms be returned to the possessor..."unless possessor is in violation of the law." Thus, there is now congressionally intended special protection for fun owners beyond the Double Jeopardy Clause.

deter and punish.

(d) At Pet. 8 and 19 to 25, the petition misstates the facts and law that the ruling "seriously threatens the ability of federal and state authorities to prosecute crimes and administer important civil forfeiture programs within their respective jurisdiction." This is utterly false.[8] The petitioner's and state amici's ability to seek in rem forfeitures or criminal forfeitures has not been effected, but their tactics that implicate constitutional concerns are corrected. The decision in essence requires the government to efficiently utilize civil in rem and criminal forfeiture statutes. The anarchy suggested by the petitioner is puffery. Petitioner and amici both still enjoy the full use of civil in rem forfeitures. The government's only task is that they will have to decide whether to include a criminal forfeiture count in the indictment or to pursue only a civil forfeiture along with criminal convictions in the criminal prosecution by including criminal forfeiture statutes in the indictment. See 18 U.S.C. § 982 and § 35554, and 21 U.S.C. § 853. Resp.App. 142a-148a. Similarly, tactical "dual sovereignty" proceedings have been utilized by the state and federal law enforcement to avoid double jeopardy rights.[9]

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[8] The government;s 1995 superseding indictment of Respondent Arlt, on remand, with the inclusion of a new criminal forfeiture count under 21 U.S.C. § 853 (Resp.App. 149a-183a) is identical to the civil forfeiture allegations in the complaint in this case. Compare the 1991 indictment (Pet.App. 79a) and the 1991 civil forfeiture complaint, (Pet.App. 30a) with the 1995 superseding indictment for criminal forfeiture and the criminal offenses. Resp.App. 149a. The government elected dual proceedings for the same offense in 1991. It is unclear why the government would argue that they could be hampered in any way with criminal prosecutions in asset forfeiture programs.

[9] The state and local law enforcement agencies typically share handsome rewards from referring state cases to the U.S. Attorneys or in which the state participated in. 21 U.S.C. § 881(e)(3)(4). See footnote 27 infra. Also, federal and state authorities frequently join together in the arrest of defendants and the seizure of property. The state and federal authorities often elect to separately prosecute the crime and pursue the forfeiture of the defendant's property in different forums under the fiction of "dual sovereignty" to avoid the personal protections of the Double Jeopardy Clause even though there is but one drug offense. Respondent Arlt and Wren were also subjected to Nevada and California state forfeitures of their vehicles, heavy mining equipment, and personal property based on the same underlying conviction for the drug conspiracy and money laundering charges. Both Nevada and California, like the petitioner, waited until Arlt's and Wren's convictions to move for summary judgement.

There is no evidence to support the "chill" claims, and the petitioner has always been aware of the use of criminal forfeiture statutes to obtain the exact same properties from the defendants by including the property in the indictment. For example, the petitioner's footnote one(1) and two (2) indicate that the government has now taken the same defendant properties in this 1991 case and included it in a new criminal forfeiture count in the 1995 superseding indictment against respondent Arlt on his remand for a new trial. Pet.App. 3, 5; Resp.App. 149a-183a. Likewise, when an indictment is not returned or the defendant is acquitted of criminal charges, the petitioner may still seek forfeiture of assets through civil in rem forfeiture by invoking statute 21 U.S.C. § 881(a) or 18 U.S.C. § 981(a)(1)(A) without violating the Double Jeopardy Clause. With this in mind, the petitioner's and amici's claim that effective law enforcement and asset forfeiture would be "chilled" has no basis in the fact or law.

This Court has previously noted the petitioner's direct pecuniary interest in the forfeiture business in U.S. v. James Daniel Good Real Property, 510 U.S. ___ 126 L.Ed. 2d 490, 540, n.2, 114 S.Ct. ___(1993):

> The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:
>
> 'We must significantly increase production to reach our budge target. '...Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.' Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990).

It is particularly important in the instant case to see whether the petitioner's claim is accurate when it insists that the government's efforts to enforce criminal laws and administer asset forfeiture programs will be chilled if they cannot criminally and civilly punish defendants in separate proceedings for precisely the same conduct and violations. See Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.")[10]

Interestingly, Nevada and California are members on the Amicus Curiae Brief.

[10] The Ninth Circuit has observed that the "war on drugs has resulted in an enormous increase in federal asset forfeitures in the last decade." United States v. $191,910.00, 16 F.3d. 1051, 1069 (9th Circ. 1994). The petitioner's annual net gain from all types

Understandably, neither the petitioner nor the amici mention their substantial profit motives in their asset-forfeiture income programs.

In United States v. Littlefield, 821 F.2d 1365, 1367-68 (9th Circ. 1987), the government appealed and won a case concerning the use of criminal forfeiture under 21 U.S.C. § 853 to do the job of civil forfeiture under § 881.

> Our conclusion is consistent with the legislature's stated understanding that the government would be able to accomplish in a criminal forfeiture proceeding under Section 853 precisely what it could do through a separate civil forfeiture proceeding under Section 881.
>
> > Where the issue relating to the civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, related to those that will arise in the prosecution of a drug offense, **it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings...**
> >
> > Thus, a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used int he offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. [21 U.S.C. § 853] creates such a mechanism.
>
> S.Rep. No. 225, 98th Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. & Admin.News 3182, 3393. It would frustrate the goals of judicial and prosecutorial efficiency to construe Section 853 as covering only a portion of property that Section 881 reaches in its entirety. (Emphasis added).

Criminal forfeiture under 21 U.S.C. § 853 is punishment and reaches the same properties and proceeds for the same underlying criminal conduct that civil forfeiture pursuant to 21 U.S.C. § 881(a)(6) reaches. In Littlefield,

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of forfeiture few from $27 million in 1985 to $531 million in 1992. Jeff A. Schnepper, Mandated Morality Lead to Leagalize Theft, USA Today Mag, March 1994 at 35. Between 1985 and 1993, the Department of Justice $3.2 billion worth of assets. Charles Oliver, a Forfeiture of Civil Liberties? Investors Daily, March 7, 1995, at A1. These assets include "home, land, busineses, currency, cars, planes, yachts and live-stock." Stacy J. Pollack, Note, Proportionality in Civil Forfeiture; Toward a Remedial Solution, 63 Geo. Wash. L. Review, 456, 457 (1994). State and local governments also benefit from federal forfeitures. In recent years, the Department of Justice has transferred $1.2 billion in cash and property over to 3,000 state and local agencies. Review of Federal Asset Forfeiture Program: Hearing before the Legislation & National Security Subcomm. of the House Comm. on Government Operations, 103d Cong., 1st Sess. 69 (1993)(statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Department of Justice). The most recent GAO estimate (in 1992) puts the federal government's total forfeiture inventory at $1.9 billion. Carl Horowitz, What Can Government Take From You? Even Innocent People Can Have Property Seized, Investor's Daily, Dec. 9, 1993 at 1. Civil Forfeitures are thus a substantial source of revenue for both federal and local governments. See Schnepper, supra at 35.

the government urged that it was more efficient to include the forfeiture of assets related to the offense int he criminal prosecution by using criminal forfeiture § 853 in the indictment as opposed to holding a separate civil forfeiture proceeding under § 881 after the criminal prosecution.

Now the petitioner switches its position and claims that requiring it to conduct one proceeding for both forfeiture and criminal prosecution will chill or hamper its abilities to seek forfeiture and criminal prosecution. The only thing chilled or hampered will be the tremendous advantage it has in requiring a defendant to defend himself in a criminal proceeding and then using the conviction against him in the separate civil forfeiture proceeding.

The decision noted this significant advantage and pointed out that the government could have sought criminal forfeiture in this case. Pet.App. 9a, 22a. In this case, the government elected not to use criminal forfeiture § 853 in the indictment but rather pursued a separate civil forfeiture for precisely the same conduct and violations. The petitioner claims that the decision has caused a glut of interlocutory appeals. Pet. 20, n.6. There is bound to be hundreds of appeals in the normal course anyway and the double jeopardy issue may be one of several issues. Any congestion being caused below is a result of the petitioner's blanket requests to stay all proceedings with this issue in the district and appellate courts pending this petition.

Many of the cases listed in the petition had already been decided in the petitioner's favor. The list is the equivalent of "puffing" to create a misleading impression of "grave uncertainty" in the status of the cases. A check of the listed cases reveals only a couple interlocutory appeals by the government for dismissed indictments. The extent of the petitioner's listed cases is a result of the government's strategy of dual proceedings to criminally indict a defendant and forfeit the assets related to the conduct and violations of the charged indictment in a separate civil forfeiture. Thus, the "problem" was invited by the government's strategy and would resolve itself if assets are either forfeiture in the criminal prosecution pursuant to § 853 or in a civil in rem forfeiture when an indictment is not returned.

The petitioner fails to mention that dozens of cases were resolved in its favor because the defendants did not contest or file a claim in the forfeiture proceeding or the in rem civil forfeiture was based on a different violation than the criminal indictment and prosecution. Accordingly, any problem will

pass in a short time after these appeals since the petitioner and amici are now effectively and properly using criminal forfeiture with the indictment offenses to accomplish the same job more economically.

The petitioner's footnote 7 is a list that is also created exclusively as a result of the petitioner's pressure upon the Central District court to not grant relief to any double jeopardy claims while petition is pending. The petitioner also did this while it petitioned the Ninth Circuit for rehearing, thus causing a huge backlog. Such a delay tactic itself raises significant Due Process concerns about the manipulative strategy of the petitioner to prevent the normal flow of cases throughout he courts to the detriment of defendants' liberty and property interests.[11]

The petitioner, not the ruling, is solely responsible for clogging the courts by its aggressive request for stays and delays in the application of the law to each litigant. This Court's prompt affirmance of the decision is needed.

(e) At Pet. 15-17, the petitioner misstates that the Ninth Circuit called the in rem statutory forfeiture § 881(a)(6) and "offense" and then the petitioner argued that this "offense" did not have the "same elements" as the criminal offense. Nowhere within the ruling does the Ninth Circuit refer to § 881(a)(6) as an "offense." Rather, the Ninth Circuit stated that in this case the in rem forfeiture statute § 881(a)(6) elected by the petitioner was a "punishment" (not an "offense") imposed on the respondents for precisely the same conduct as their criminal indictment and conviction. Indeed, all the petitioner's pleadings admit this.

(f) At Pet. 16, the petitioner misstates that the ruling below relied on the Blockburger test. The Ninth Circuit did not base its decision on Blockburger since this was not a multiple criminal prosecution or multiple criminal sentence case. Being that this case involved only a civil punishment for the same criminal conviction and offense conduct, the Ninth Circuit relied

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[11] Petitioner's claim of endangered prosecution and convictions is the result of invited error since the prosecution initiated each action. See Pet. 20, 24, n. 6 & &, listing cases on appeal and 2255 motion. It is unlikely that many claims will survive, and if a few defendants obtain relief, it would be warranted depending only on the charging documents and basis for forfeiture. The decision did not hold double jeopardy applied upon a mere seizure as stated by the dissent. The panel specifically stated this decision was based on the facts of this case only. 33 F.3d 1216, 1219, n.8; Pet.App. 7a, 15a n.8.

on Austin to establish that the civil forfeiture was punishment and on Halper and Kurth Ranch to conclude that the Double Jeopardy Clause bars multiple civil and criminal sanctions for the same offense when the civil sanction is not solely remedial but also punitive.

The Double Jeopardy Clause provides three separate protections: 1) protection against reprosecution for the same offense after an acquittal; 2) against prosecution for the same offense after a conviction; and 3) against multiple punishments for the same offense. Halper, supra. At issue here is the third prong, multiple punishments.

The petitioner's double jeopardy argument and issue conflates the three separate prongs of Double Jeopardy Clauses analysis. The decision below is not base don a successive criminal "prosecution" case where there are two criminal trials on two indictments which require the same "elements" test under Blockburger v. United States, 284 U.S. 299 (1932) as insisted by the petitioner. Likewise, the petitioner's "lesser-included offense" test under Brown v. Ohio, 432 U.S. 161 (1972), proposed analysis at Pet. 15-17 is inapplicable here also and only relevant in criminal "prosecutions" to determine if one offense is included within another so to invoke the double jeopardy prohibition against successive "prosecution."

In rem civil forfeiture under statute § 881(a)(6) [and (a)(4) and (a)(7)] is not an "offense" as alleged by the petitioner, but rather a statutory "punishment" for violation in 21 U.S.C. § 801 et. sequence subchapter selected by the government as its grounds for the forfeiture of property. An "offense" is required to be alleged in the civil complaint by the petitioner to use § 881(a)(4), (a)(6), and (a)(7) "punishment," and each section subsumes a drug law "offense" as a predicate.

In a "multiple punishment" case based on a civil in rem statutory forfeiture for the same violation as the criminal prosecution, the test should not be the Blockburger "same element" test but the "multiple punishment" test described in Halper and Kurth Ranch, neither of which relied on Blockburger. A civil forfeiture under § 881(a) is not an "offense:. An offense must be charged by indictment. § 881(a) can only be brought by a civil in rem action and not a criminal indictment (as § 853 may be).

In United States v. Libretti, ___U.S.___ (11/7/95) No. 94-7427, this Court stated "that forfeiture operates as punishment for criminal conduct, not as a separate substantive offense, is demonstrated by the test of the relevant

statutory provisions."

(g) At Pet. 17, the petitioner misstates that the "Ninth Circuit's view that the narcotic and money laundering crimes are necessarily 'included' within the forfeiture 'offense' constitutes a significant departure from the controlling decisions of this Court." The Ninth Circuit ruling does not state anything remotely close to this allegation, and clearly forfeiture is not an "offense," but rather it is a "punishment" under § 881(a)(6) or § 981(a)(1)(A) for the criminal offense in the indictment when the government so states in the civil complaint as it did in this case. 33 F.3d at 1216; Pet.App. 6a-7a.

(h) At Pet. 18, the petitioner misstates that the Ninth Circuit ruling suggests that the civil forfeiture and criminal prosecutions be brought in the same proceeding, then the petitioner explains that this is not possible. The Ninth Circuit did not state such a claim, but rather it encouraged the prosecutors to use the available statutes for criminal forfeiture in the indictment for the criminal charges, or use civil in rem forfeiture for cases the government did not wish to criminally prosecute. 44 F.3d at 1216-1217, 1222; Pet.App. 8a-9a, 22a.

3. There is an appearance of conflict in a minority of the circuits on the Question Presented herein, but there is no conflict with this Court.

The petition should be granted and the decision affirmed because the Ninth Circuit's decision that the Double Jeopardy Clause bars the government from seeking an in rem forfeiture under § 881(a)(6) after the owner has already suffered a criminal conviction for precisely the same conduct and violations alleged in the forfeiture complaint, is not in conflict with the decisions of this Court. Indeed, the Ninth Circuit decision is a direct application of the rulings in Halper, Austin, and Kurth Ranch. The decision was based on the facts of this case and the petitioner's choice of statutes.

(a) Petitioner's attempt to create an appearance of conflict between the Ninth Circuit's decision with those of the Second and Eleventh Circuit is misguided. The Second and Eleventh Circuit decisions relied on in the petition held that separate civil in rem forfeiture proceedings and a criminal prosecution are a "single, coordinated prosecution" for double jeopardy purposes. However, those circuits' decisions were rendered without the benefit of the 1994 ruling from this Court in Department of Revenue of Montana v. Kurth Ranch, supra, where this Court found no significance in the fact that the defendant's criminal and civil tax cases were "coordinated." Furthermore, the

Second and Eleventh Circuits' decisions are distinguishable on their facts and the controlling forfeiture statutes involved.

The Eleventh Circuit case, United States v. One Single Family Residence, 13 F.3d 1439 (11th Circ. 1994) involved a civil forfeiture of the owner's homes and a criminal prosecution for gambling. The statue invoked for the civil forfeiture was 18 U.S.C. § 1955 and not §881(a)(6) as was invoked in the Ninth Circuit's decision. Besides being doubtful after the Kurth Ranch ruling, some judges in the Eleventh Circuit question the Circuit's reasoning in light of Kurth Ranch and the instant Ninth Circuit decision.[12]

The Second Circuit case, U.S. v. Millan, 2 F.3d 17 (2nd Circ. 1993), involved a stipulated settlement combining seized properties in both the civil complaint and the criminal indictment. These facts make Millan unique and very distinguishable from the instant case.[13]

(b) At Pet. 10, the petitioner claims that the Ninth Circuit's decision that civil forfeiture of the proceeds of drug activities is characterized as punishment is in conflict with this Court's precedents and the Fifth Circuit.

In support of this claim the petitioner refers to United States v. Tilley, 18 F.3d 295 (5th Circ. 1994), cert. denied, 115 S.Ct. 573-74 (1994), as a case in conflict with this decision in the Ninth Circuit and the Fifth Circuit cases do have significant distinguishing and dissimilar factual contexts, and that the Fifth Circuit agrees that civil forfeiture based on the criminal indictment does indeed implicate the Double Jeopardy Clause--but the Fifth Circuit incorrectly excluded 21 U.S.C. § 881(a)(6) as a punishment statute because of

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[12] The U.S. v. One Parcel of Real Estate located at 13143 S.W., 872 F. Supp. 968 (S.D. Fla 1944), the judge in denying the claimant's double jeopardy motion opined that "despite the logic of the Ninth Circuit's reasoning [in $405,089.23] this court is bound by the Eleventh Circuit's decision." Id at 972 n.6. The court then found "this Court is constrained to find that his criminal prosecution and the civil forfeiture proceedings involving [claimant's] conduct constitute a single, coordinate proceedings for the purpose of double jeopardy analysis." Id at 972.

[13] In United States v. $145,139.00, 18 F.3d 73 (2nd Cir. 1994), dissenting Judge Kearse concluded that the civil forfeiture of a claimant's money, after he had already been prosecuted and punished for his failure to report the money when leaving the country, violated the Double Jeopardy Clause. The decision never mentioned Millan. A recent Second Circuit decision, United States v. G & P Automotive Corp, 66 F3d 483, 493-499 (2nd.Cir. 1995), favorably referred to "[t]he Ninth Circuit's forceful opinion in $405,089.23...." in light of Austin and Kurth Ranch.

inconsistent reading of the "proceeds" clause. The Tilley's claim involve involve a pretrial agreement in which the defendants stipulated and agree to forfeiture. The district court's order of forfeiture did not specify if the property was proceeds, and the complaint alleged two theories: § 881(a)(6) proceeds and property traceable to proceeds of illegal drug sale, and § 881(a)(7) real property used to facilitate drug trafficking. However, Tilley adamantly claimed his property was just proceeds. The Tilley panel then concluded that the defendants should bear the cost of the entire drug wars, and therefore the forfeiture "fails to compensate fully for the wrongs done from all the drug sales." Id at 299. (Cf. Halper did not pay for "all" medical fraud.)

The Ninth Circuit decision had nothing to do with a settlement or agreement to forfeit assets. Tilley's reasoning on proceeds is inconsistent with the legislative intent of § 881(a)(6) to deter and punish. The Fifth Circuit should resolve their own conflict with the Wood case.[14]

At Pet. 10-11, the petitioner contends that the forfeiture of respondents' assets, cars, plan, shrimp boat, silver bars and money in banks, under § 881(a)(6) is equal to the remedial confiscation of bank robbery process or securities fraud proceeds (which should be restored to their owners). Petitioner has misperceived the confiscatory actions of seizure of robbery and fraud proceeds from a defendant as "forfeiture." Such actions are actually remedial "restitution," or recovery, to make a particular robbery victim whole. Unlike robbery and fraud cases where there is a victim requesting to be mae whole, drug offenses lack a particular victim requesting restitution from the defendant. Therefore, the forfeiture of alleged drug proceeds are both being recovered to make a particular victim whole but rather to punish the defendant for his alleged violations of laws prohibiting drugs. Furthermore, the forfeiture becomes a a payment to the sovereign who profits from the forfeiture of the defendants' assets.

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[14] The Tilley court never tied one dollar of Tilley's money to a specific loss by a specific victim. There was no list of damages of losses. Instead the Court, contrary to its Wood ruling, concluded that a drug defendant must pay the entire drug war cost. The Tilley court did not explain how this was to be implemented, and apparently the local federal agency simply obtained a windfall because the Tilley court made no order of restitution. (Note that in Halper, the Court did not permit the government to have Halper pay the national medial fraud cost to society.)

The petitioner has mistakenly mixed fraud case decisions into its argument that a § 881(a)(6) is a "disgorgement" of property and not punishment "because it only serves to recover a defendant's ill-gotten gains.[15] One case cited by petitioner involved fraud directly upon the government and stock market investors where the "disgorgement order" imposed by the Securities and Exchange Commission was purely remedial in nature for violations of securities laws [not the statutes involved here] and did not constitute punishment within the meaning of the Double Jeopardy Clause, S.E.C. v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994). Petitioner also relies on United States v. Carson, 52 F.3d 1173, 1182-83 (2nd Circ. 1995), where the defendant was "disgorged" of funds he embezzled from the Union for his salary. The remedial statute in those cases were different than the in rem punishment statute § 881(a)(6) at issue in the petition. Thus, there is no significant statutory conflict with any of the cases cited by the petitioner.[16] Petitioner misperceives the importance o the scope and intent of the particular statute invoked in this case compared to the

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[15] "Ill-gotten gains" are also subject to taxation as income, and to penalties for late reporting. Criminal statutes permit fines to be imposed. Disgorged proceeds go to the fraud victim. In § 881(a)(6), forfeiture proceeds of cars and personal assets go to the sovereign as profits. "Proceeds" is a malleable concept that can be used in different contexts for different statutes. One meaning does not fit all applications as inferred by petitioner.

[16] The brief of amicus curiae from the Commonwealth of Massachuettes et. al., in support of the petition also relies on the alleged conflict on "proceeds" by referring to Tilley Bilzerian, and Carson. The amicus brief, like the petition, fails to notice the difference in the different statutory schemes, in Bilzerian (concerning securities law violations and fraud to investors) and in Carson (a statute to recover embezzled funds). Although Tilley does concern 21 U.S.C. § 881(a)(6) and (a)(7), the amicus brief and the petition both ignore the Tilley panel's conflict with its own contradictory ruling that § 881(a)(6) is definitely a punishment in Wood v. United States, supra. Likewise, the amicus brief and the petition fail to admit that the sovereign takes (a)(6) "process" as pure profit just like it takes assets under (a)(4), (6), or (7) that "facilitated" or were "involved in" an alleged drug transaction. It seems that the petition and amicus brief use words like "process" as a trump card to justify windfall profit in the assumption that "proceeds" will inflame a fact finder to continue the "remedial" fiction. Proceeds from a theft or fraud is far different than proceeds from a prohibited activity in vice offenses or prohibitions. A "proceeds" dollar is just as much profit to the state as any other forfeiture under the same subsection, and not one "proceeds" dollar goes to any metaphysical victim, but rather it is just a perk and a benefit fund outside of the law enforcement agencies normal budge.

fraud case statutes cited by the petitioner. "Proceeds" taken under fraud statutes are for a different purpose than "proceeds" taken under an in rem statute intended in part to deter and punish. Indeed, the Bilzerian and Carson "proceeds" are returned to the defrauded source of the proceeds. Whereas, forfeited § 881(a)(6) process are distributed to law enforcement agencies as profits for their use and to reward informants. See § 881(e)(1).

Similarly, the petitioner's claim of a conflict with United States v. Morgan, 51 F.3d 1105, 1113 (2nd Circ. 1995), is irrelevant since Morgan was trying to use his fraud repayment obligations (a restitution) as a double jeopardy war to his criminal charges of bank fraud. Moran had stolen money. Morgan's case did not involve the in rem forfeiture statutes in the instant case, and it was exclusively a remedial situation of restitution and not of punishment. The money went back to the bank. The Austin test would not help Morgan turn a restitution order into a statutory punishment.

The petitioner claims that the Ninth Circuit decision is inconsistent with United States v. Borromeo, 995 F.2d 23, amended on reh'g, 1 F.3d 219 (4th Circ. 1993). Borromeo should not survive Austin and Kurth Ranch which was decided after Borromeo's rehearing which focused on § 881(a)(7) interpretations. The Borromeo court mistakenly used vague and indefinite "costs to society" theories without itemizing any actual loss to make its generalization on process.

A recent Sixth Circuit case, United States v. Salinas, 65 F.3d 551 (6th Cir. 1995) did disagree with $405,089.23 on the issue of "proceeds" and adopted the Tilley reasoning that focused on the metaphysical "harm inflicted upon the government and society by the underlying criminal act" to find the forfeiture of process "will always be directly proportional to the amount of drugs sold." Id. at 553. Salinas failed to understand that forfeiture is "punishment" if the test of the relevant statute says so. See United States v. Libretti, supra.

There is some conflict with the Sixth and Fifth Circuits on the plain meaning of § 881(a)(6) to deter and punish. Review should be granted and the decision affirmed that § 881(a)(6) in a punishment implicating the Double Jeopardy Clause.

(c) The petitioner cites Witte v. United States, 115 S.Ct. 2199, 2204 (1995) to support his contention that the Blockburger analysis applies to "multiple punishment" claims. Pet. 15. The court in Witte determined that the consideration of relevant criminal conduct at sentencing under the Sentencing

Guidelines § 1B1.3 in a prior criminal case would not prohibit a later indictment for the uncharged conduct. Witte involved two different criminal sentences for different offenses in separate proceedings upon different grand jury indictments. Blockburger analysis was applied to the two criminal cases to determine if the two criminal sentences were for the same indicted offenses. The Ninth Circuit is distinguishable because this decision has to do with one criminal indictment and a later separate civil in rem forfeiture where the government elected to use precisely the same criminal indictment, prosecution, and conviction conduct as grounds for a judgment.

Petitioner mistakenly claims that the Ninth Circuit decision conflicts with Jeffers v. United States, 432 U.S. 137 (1977). Pet. 4, 18. Jeffers dealt with a defendant who requested and was solely responsible for his conspiracy case being conducted separately from his Continuing Criminal Enterprise case, although 21 U.S.C. § 846 is a lesser included offense of § 848 for double jeopardy purposes. If the government had been the cause of Jeffers dual criminal proceedings, the result would have been different. Here, the Ninth Circuit decision was based on the fact that the government elected to bring a civil forfeiture proceedings separately from a criminal prosecution. The respondents have never requested a separate criminal prosecution without criminal forfeiture, or that the conviction be followed by a separate civil in rem forfeiture.

(d) It follows that there is no conflict with the ruling of this Court in Austin in determining whether 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) are not solely remedial, but were intended to deter and punish. The conflict with the Fifth Circuit in United States v. Tilley, supra, is easily distinguishable on the factual contexts based on misreading the text of the § 881(a)(6), and should be handled in the Fifth Circuit because of its own conflict with Wood v. United States, supra.

The conflict with the Sixth Circuit in United States v. Salinas, supra, is also based on a misinterpretation of the text of § 881(a)(6). However, the Ninth Circuit decision is not in conflict with this Court in its reliance on the text of the relevant statutes to determine they are meant to punish. Likewise, the Ninth Circuit decision is not in conflict with the rulings of this Court in Halper, supra, Kurth Ranch, supra, in determining that a separately filed civil in rem forfeiture action and a criminal action based on the same criminal conduct and offenses constitutes separate proceedings for

double jeopardy purposes.

While the petition appears to rely principally on its argument that the res now consists entirely on illegal proceeds, this argument will not escape the legal standard established in Austin. Respondents submit that even a most generous view of the petitioner's claim is unavailing since it ignores the scope of the particular statutes it selected to use against the respondents in seeking criminal and civil penalties. This decision is narrowly applied to those forfeitures elected by the government to go forward under 21 U.S.C. § 881(a)(4), (a)(6) and (a)(7) which are the only § 881(a) statutes enacted "to punish and deter" those involved with prohibited controlled substances, and which contain specific "innocent owner" exception to avoid "punishing" an innocent. There is no merit to claim that any "remedial" forfeiture would be affected. However, to eliminate the conflict, certiorari should be granted and the decision affirmed.

4. The Ninth Circuit fully considered and correctly decided the issues raised by the government below, based on the facts of this case and the precedents of this Court.

(a) The Ninth Circuit relied on United States v. Halper, supra, where this Court considered "whether and under what circumstances a civil penalty may constitute a punishment for the purpose of double jeopardy analysis." 490 U.S. at 436. The Court fashioned the following test: "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, in punishment." Id at 448-49. Specifically, the Court held that the Double Jeopardy's prohibition against multiple punishment for the same offense was violated when "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id at 449.

The Ninth Circuit followed the instructions of Austin v. United States, supra, where the Court relied heavily on the rationale of Halper to determine civil forfeiture pursuant to 21 U.S.C. § 881(a)(4) and (7) constitutes punishment for purposes of the Eight Amendment's Excessive Fine Clause. Austin, 113 S.Ct. at 2806. However, rather than focusing, as the Court had in Halper, on the goals of the sanctions in the individual case, the Austin Court reasoned that in the forfeiture context it made more sense to focus on the forfeiture statute as a whole because "[t]he value of the conveyances and real

property forfeitable under § 881(a)(4) and (a)(7),...vary so dramatically that any relationship between the government's actual costa nd the amount of sanction is merely coincidental." Austin, 113 S.Ct. at 2812, n.14. See also Kurth Ranch, 114 S.Ct. at 1948, (focusing in goals of tax statute as a whole). The Court concluded that forfeitures under § 881(a)(4) and (7), are properly considered punishment because : (1) nothing in the section contradicts the historical understanding of forfeiture as imposing punishment; (2) the sections focus on the owner's culpability by providing for the "innocent owner" defense and by typing forfeiture directly to the commission of drug offenses; and (3) Congress understood the section as serving the goals of deterrence and punishment. Austin, 113 S.Ct. at 2810-11.

The Austin Court's historical analysis of forfeiture as punishment and its reliance on the legislative history of § 881 are equally applicable in the instant case dealing with § 881(a)(6).[17]

The Ninth Circuit observed that like the sections of the forfeiture at issue at Austin, § 881(a)(6) also includes an innocent owner defense, which focuses on the culpability of the owner in a way that makes it look more like punishment. See Austin, 113 S.Ct. at 2810-11. Also, § 881(a)(6)'s conditioning of forfeiture on a violation of the Controlled Substance Act is also indicative of Congress' intent to deter and punish. See Id. at 2811.

The Ninth Circuit court held that the government violated the Double Jeopardy Clause by obtaining criminal convictions against the respondents and then continuing to pursue the in rem forfeiture action based upon the same conduct and violations prosecuted in the respondents' indictment. The court concluded by discussing the practical effect of Austin on the government's prosecution of cases:

> Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding--that is, the same indictment--the government will often be forced to choose whether to include a

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[17] The following are subject to forfeiture under § 881(a)(6): All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for controlled substances in violation of this subchapter, all proceeds traceable to such exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of any owner, by reason or any action or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. 21 U.S.C. § 881.

> criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceedings) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it 'will have to rely to a much greater extent on criminal forfeiture.' It is entirely reasonable to put the government to this choice. After Austin, the law requires it.

33 F.3d at 1222 (citation omitted). Pet.App. 22a. The Ninth Circuit's reasoning is logical. The government is not at all disadvantaged.

(b) Congress in enacting § 881(a)(6) gave the government the opportunity to punish and deter individuals who could not be criminally indicted or convicted because of the lack of evidence and would otherwise go unpunished for their criminal activities. Prior to the enactment of § 881(a)(6), law enforcement could not seize assets that were believed to be "proceeds" of illicit drug activities. § 881(a)(6) is a weapon in the war on drugs and not a "remedy" for the victims.

The petition does not find any support to its theory in the legislative history of § 881(a)(6). The petition does not claim that Congress enacted § 881(a)(6) to "remedy" society. Legislative history is conspicuously absent from the petition because it goes against the petition's position that § 881(a)(6) is not punishment. The petition and the amicus brief rely on the influence and visceral appeal of the catch-phrases "drug proceeds" or "ill-gotten gain" to avoid the clear purpose and intent of Congress that § 881(a)(6) forfeitures are "to deter and punish." Legislative history does not support the petitioner in this case.

The petitioner has previously acknowledged that the purpose of taking drug profits is to deter and punish. In Austin, this Court noted that the same petitioner had used the legislative history of § 881(a)(7) in its brief in United States v. 92 Buena Vista, Rumson, 507 U.S. ___, 122 L.Ed. 2d 469, 113 S.Ct. 1126 (1993)(Brief for the United States in No. 91-781, pp 41-42) that Congress recognized "that the traditional sanctions of fine and imprisonment are inadequate to deter and punish the enormously profitable trade in dangerous drugs." S.Rep. No 98-225. p. 191 (1983). See Austin, 125 L.Ed.2d at 504, n.13. Thus, forfeiture under (a)(7) was to "deter and punish" for "profitable" trade in dangerous drugs, i.e., to punish for profit making on drugs by forfeiture of the profits, or proceeds. However, in the instant case, the petition fails to discuss any legislative history of any § 881(a) statute to support its new theory that forfeiture of the profits, or proceeds. However, in the instant

case, the petition fails to discuss any legislative history of any § 881(a) statute to support its new theory that forfeiture of the profits (i.e., proceeds) of the drug trade is not punishment, but some sort of metaphysical remedy to society (even though it goes to the raiding agency's coffers a as a windfall for official, personal consumption, informants, rewards and agency sharing. § 881(a).

The legislative history of 6 881(a)(6) makes clear that when Congress expanded civil in rem forfeitures to include "proceeds" in 1978, the joint House and Senate committee expressly and specifically recognized the "penal nature" of the section. Thus, § 881(a)(6) is not "wholly remedial," and it does serve in part to punish:

> "The...[1978] amendment expands...the Action [§ 881(a)(6)] to provide for forfeiture of the following additional type of property: (1) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for illicit controlled substances; (2) all process traceable to such for exchange for illicit controlled substances; and (3) all monies, negotiable instruments and securities used or intended to be used to facilitate any controlled substance law violation. **Due to the penal nature** of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity that the statute seeks to prevent. Specifically, the ...amendment provides for the forfeiture of property exchanged or intended to be exchanged in an illegal drug transaction. In addition, it provided for forfeiture of property which is the proceeds of an illegal drug transaction... Finally, it should be pointed out that no property would be forfeited...to the extent of the interest of a innocent owner of such property." [Joint Explanatory Statement of Title II and III, 124 Cong.Rec. 17547 reprinted in 1978, U.S.C.C.A.N. 9518 (Emphasis added).

Thus, the Ninth Circuit decision was consistent with the purpose of § 881(a)(6). The legislative history of § 881(a)(6) shows Congress' intent to deter and punish.

(c) In the instant case, the Ninth Circuit reasonably relied on Austin and Halper in holding that civil forfeiture pursuant to 21 U.S.C. § 881(a)(6) constitutes punishment which triggers the protection of the Double Jeopardy Clause, 33 F.3d 1219; Pet.App. 15a. Cf. United States v. Ursery, 59 F. 3d 568 (6th Cir. 1995) (holding that civil forfeiture pursuant to § 881(a)(7) followed by criminal conviction for the same offense constituted double jeopardy). The Ninth Circuit reasoned that:

> "the only fair reading of the Court's decision in Austin is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes to the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the Halper criteria, it constitutes 'punishment' for purposes of bother clauses."

33 F.3d at 1219. Pet.App. 15a.

The instant Ninth Circuit case is narrow, like Halper. The "multiple punishment issue before us is narrowly framed by the common understanding of the parties of this case. They do not dispute that [respondents] already [have] been punished as a result of [their] prior criminal proceedings [they were] punished to a jail term[]. Nor do they dispute that the instant proceeding and prior criminal proceeding concern the same conduct[]." United States v. Halper, 490 U.S. at 441. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." Ex parte Lange, 18 Wall 163, 168, 21 L.Ed. 872 (1974)." Id. The Ninth Circuit case below is procedurally identical to Halper.

The Ninth Circuit decision did not change anything in "multiple punishment" analysis where a civil and criminal penalty are the judgments involved. See Halper, supra; and Kurth Ranch, supra. The sustain this double jeopardy challenge under the multiple punishment prong, the Ninth Circuit Court found: (1) two judgements of punishment, (2) imposed in two separately docketed actions (3) for precisely the same conduct charged in the criminal indictment and prosecution, and (4) against the same defendants (the respondents herein).[18]

(d) The government's (petitioner and amici) ability to label most forfeiture properties as "proceeds" seems to have no limit in practical application. In the instant case, the government could not tie any property to a specific illegal act, and no property was illegal in itself. Nonetheless, the government merely alleged "proceeds" and based its burden of proof for forfeiture solely on the same indictment charges and criminal minutes.

To accept petitioner's argument that a statute enacted by Congress specifically to "deter and punish" persons who obtain proceeds from or "traceable to a drug transaction is "remedial", would be to negate legislative intent to deter and punish, the language of the statute, and continue a fiction

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[18] Importantly, it should be irrelevant which sovereign conducts the criminal prosecution or the civil in rem forfeiture action when the above four elements are met, because then the Double Jeopardy Clause should prohibit the second punishment. Tactical dual criminal-civil punishments under the fictive "dual sovereignty" doctrine are still punishments by law enforcement acting in harmony, and if based on the same conduct, then a violation of the Fifth Amendment has occurred. "See, United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 493-499 (2nd Circ. 1995.

that such forfeitures do not really punish the guilty owner. The owner of forfeited property surely feels punished by the loss. There is no drug customer requesting restitution "to made whole" from a theft or fraud.

When the penalty to the owner under § 881(a)(6) becomes mere profit for sovereign rather than restitution to victims as in fraud cases, the forfeiture is not remedial.[19] When the forfeited items of "proceeds" are not illegal in themselves, like money in the bank, vehicles and property, the forfeiture penalty is still a windfall to the sovereign and not remedial as are the removal of illegal regulated items for public safety, such as forfeitures of firearms, drugs, or chemicals. (I.e., United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)).

(d) The Ninth Circuit correctly rejected the petitioner's reasoning o Austin and Halper.

The petition also contends at Pet. 14 that under Austin, only civil forfeiture that are found to be excessive are to be considered punishment. However, the Ninth Circuit showed that the government's argument not only misconceived the legal standard established in Austin, but also it misstated the scope of the statues involved. 33 F.3d 1220; Pet.App. 18a. Austin held that all forfeiture under § 881(a)(7) are meant in part to punish and therefore can run afoul of the Excessive Fines Clause. Austin, 113 S.Ct. at 2812. The Austin court left the issues of whether the forfeiture was constitutionally excessive to the district court in the first instance. Id.

At Pet. 10, the government also contends that the applicant of Halper is for the "rare case where the civil action was overwhelmingly misproportional to the damages caused by the wrongful conduct of the respondents. Thus, petitioner concludes that the instant in rem forfeiture of respondents' property does not constitute punishment. However, in Austin, the Supreme Court found that such a test was inapplicable in a forfeiture setting, and instead

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[19] See Black's Law Dictionary, Sixth Edition, page 1294, Remedial laws or statutes: ("The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a casual connection with the breach of the legal obligation owing under the statute to such individual or class.")

looking to the purpose behind the forfeiture statute itself, concluded that forfeiture serves in part to punish. 113 S.Ct. at 2812, n.14. In the forfeiture context it does not make sense to compare the amount seized with the government's damages and actual costs; the value of the property seized is purely fortuitous, and thus "any relationship between the government's actual cost and the amount of the sanction is merely coincidental." Austin, 113 S.Ct. at 2811-12, n.14. Moreover, the government had failed to demonstrate on the record how the forfeited property related to any damage or even its cost of investigation and prosecution of respondent' criminal case.

Finally, at Pet. 18, the government argues that to the extent that the forfeiture in the instant case can be considered punishment, it is punishment imposed against the property itself and not against the owner of the property. However, the Supreme Court in Austin stressed that it has consistently recognized that in rem forfeiture serves, at least in part, to punish the owners. 113 S.Ct. at 2810. Moreover, the Court made clear that forfeiture of property such as vehicles and real estate under the current forfeiture statute is dependent not on the criminal nature of the property but on the illegal use their owners make of them. Austin 113 S.Ct. at 2810-11. The same reasoning applies to illegal used vehicles, assets or monies forfeited under § 881(a)(6). Thus, it is the owners who are punished by the forfeiture of such property. Id at 2811.

This Court in Halper addressed the question of what constitutes "punishment" for the purpose of the Double Jeopardy Clause. 490 U.S. at 436. The Halper court announced that the property inquiry is whether the sanction serves the goals of punishment, I.e., retribution or deterrence. Id. at 448.[20] In Austin, the Court held that Congress intended for the forfeiture of property pursuant to § 881(a)(4) and (a)(7) to "deter and punish." See Austin, 113 S.Ct. at 2811. Similarly, as previously discussed, Congress intended § 881(a)(6) to deter and punish. Therefore, forfeiture pursuant to § 881(a)(6) should also constitute punishment for purposes of the Double Jeopardy Clause.[21]

(f) The Ninth Circuit correctly followed precedent to determine that §

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[20] It is significant that neither the Halper or Kurth Ranch decision on "multiple punishment" placed any reliance on the Blockburger analysis, supra at 22-23.

[21] 18 U.S.C. § 981(a)(1)(A) is nearly identical and has an innocent owner provision in (a)(2).

881(a)(6) is categorically punishment. The petitioner's insistence that § 881(a)(6) is not categorically punishment because of its "proceeds" clause is foreclosed by the rulings from Halper and Austin to determine if statute § 881(a)(6) was "punishment". Section 881(a) had eleven civil forfeiture statutes which can be divided into two categories, one remedial and the other punitive.[22]

The first category includes property which is dangerous and/or illegal per se and thus subject to destruction or removal from society. The forfeiture of such dangerous or regulated property cannot constitute punishment for purposes of the Double Jeopardy Clause because its forfeiture may be characterized as "remedial" and not "deter and punish." This category of § 881(a) includes (a)(1), all controlled substances which have been manufactured, distributed, dispensed, or acquired; (a)(2), all raw materials, products, and equipment which are used in manufacturing any controlled substance, all property which is used as a container; (a)(3), all books, records, and research, including formulas, microfilm, tapes, and data which are used in violation of this subchapter, § (a)(5); (a)(8), all controlled substances which have been possessed in violation of this subchapter, § (a)(8); (a)(9) all listed chemicals, all drugs manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, § (a)(9); § (a)(10) any drug paraphernalia; and § (a)(11) any firearm, § (a)(11).

The items included in the first category are either illegal per se and/or dangerous to society in general or to law enforcement agents in particular. The Austin court conceded that "the forfeiture of contraband itself may be characterized as remedial because it removed dangerous illegal items from society." 113 S.Ct. at 2811 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1994), which involved forfeiture of firearms). Indeed, Congress recognized that such property is dangerous by providing for its summary forfeiture and destruction. Specifically, Section 881(f)(1) provides that all controlled substances, all raw materials, and any equipment or container subject to forfeiture, which cannot be separated safely from such raw

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[22] The issue involved here does not address the confiscation of property that a defendant does not have title to, i.e., stolen property, is punishment for double jeopardy purposes. The government can immediately confiscate such property and is not required to institute forfeiture proceeding. The government seizure of stolen property for return to the owner should not involve in rem forfeiture action.

material or product, shall be deemed contraband and summarily forfeited to the government to destroy such property. See also H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. (1990) reprinted in 1990 U.S.C.C. A.N. 6472, 6506 (providing for summary forfeiture and destruction of dangerous substances and the equipment or containers from which the substances cannot be safely separated "because of the dangers they create for law enforcement agents"). Similarly, Congress provided that the selling and interstate transport of drug parapherna is illegal, § 863(a), and that drug paraphernalia is subject to seizure, forfeiture, and destruction. § 863(c).

The second category consists of property forfeited pursuant to § 881(a)(4), (6), (7), which are lawful items whose forfeiture is intended to deter and punish the owner for violations of law.

Under § 881(a)(6) there are three categories of property subject to forfeiture: a facilitation provision, an exchange provision, a proceeds provision (which itself has distinguishable categories of actual, direct, indirect and derivative "proceeds"); and an innocent owner provision.

The petitioner argues that the "proceeds" clause of the statute § 881(a)(6) should be singled out and excluded from the concept of "punishment". The petitioner's argument conflicts with the intent of the legislature when it enacted § 881(a)(6) to punish and deter those involved with illegal drug activity. The problem with the government's attempt to exclude the process clause from the punitive categorization of § 881(a)(6) is that there is no limit to what the government could claim was "proceeds." As in the instant case, the brush it uses paints too wide a stroke. Continual hair-splitting arguments could prolong litigation on what is, or is not, "proceeds" if the § 881(a)(6) is not also categorically "punishment" as intended by the statute and under the analysis of Austin. It is not too unlikely that if § 881(a)(6) "proceeds" in general was determined to somehow be "remedial" and not to be punished, then most future § 881(a) civil forfeitures would likely be alleged as "proceeds" and separate civil and criminal cases for the same violations would continue to be the elected advantageous strategy.

As used in § 881(a)(6), the word "proceeds" means property derived from money (or other things of value) directly exchanged for drugs, i.e., property acquired with profits of drug trafficking. "The cash directly acquired in exchange for the drugs is not the "proceeds", it is the 'moneys...furnished...in exchange for a controlled substance' forfeited under

the exchange provision. If the cash acquired is exchanged for drugs is used to purchase a house and the house is later sold for cash, that cash is "proceeds" under § 881(a)(6) but the original cash obtained from the sale of the drug is not.

Unfortunately, the limit of "proceeds" is unknown and arbitrary. "If a house were received in exchange for another house, would the traceable proceeds consist of the first house, the second house, or both, with the government having an election between the two? United States v. 92 Buena Vista Ave., Rumson, N.J., 507 U.S.___, 113 S.Ct. 1126, 1138, 122 L.Ed.2d 469 (1992). It seems that no matter how many times the property changes form it still remains "proceeds" subject to forfeiture if the government can claim a drug connection in the past. But the tracing, as in the instant case, is purely speculation. "Following such a trail is often neither sensible or practical. There comes a time when two items of property, though logically connected by a long string of transactions, are too remote one from the other to justify forfeiture, and therefore cannot be termed traceable to or derived from one another.," In Re Moffit, Zwerling & Kemler, P.C., 875 F.Supp.; 1152, 1160 (E.D. Va. 1995). Tracing, philosophically, could go forward to eternity.[23]

As this Court made clear in Buena Vista:

> "We are not aware of any common-law precedent for tracing proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture..." [See U.S. v. Buena Vista, 507 U.S. ___, ___, 122 L.Ed.2d 469, 483, 114 S.Ct. ___(1993)"

It was not until the 1978 Amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, that Congress, for the first time, provided for the forfeiture of "proceeds" and at the same time provided an "express and novel protection for innocent owners," by which only "proceeds" owned by guilty individuals could be subject to forfeiture. See U.S. v. Buena Vista, 122 L.Ed.2d at 480-481.

Thus, under these new amendments, which for the first time provided for

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[23]"Analogously, in the context of tort law, courts long ago recognized that factual or 'but for' causation, taken to its logical extreme, extends legal liability too far, for '[i]n a philosophical sense, the consequences of an act go forward to eternity.' Keeton, et. al., Prosser & Keeton on the Law of Torts, 264 (5th Ed. 1984). Thus, under the heading of 'proximate' causation, courts set boundaries on tort liability according to 'some social ideal od justice or policy.' Id. Likewise, the concept of tracing reaches must further in logic than it should in practice." In Re Moffitt, Zwerling & Kemler, P.C., 875 F.Supp. at 1160, n. 27.

the forfeiture of "proceeds" and an "innocent owner" defense, only those individuals who are themselves guilty "of a violation of this subchapter" will suffer punishment of forfeiture of their property.

And again, in Austin, 125 L.Ed.2d at 503-04 this Court held that:

> "[T]he inclusion of innocent-owner defense in §§ 881(a)(4) and (a)(7) [like the identical worded § 881(a)(6)] reveals a similar congressional intent to punish only those involved in drug trafficking."

Accordingly, there is the same legislative intent and reason to characterize the forfeiture of "proceeds" as "punishment" as there is for other property that may have been used to "facilitate" a drug offense under § 881(a)(6).

Although viscerally appealing, the forfeiture of "proceeds" of vehicles, property or assets alleged to be from or traceable to drug transactions, under § 881(a)(6), is no less a punishment to the owner than forfeiture of vehicles, property, or assets under § 881(a)(4) and (a)(7). Moreover, the police and federal agencies consume the forfeited "proceeds", vehicles and property the same way under (a)(6), as they do under (a)(4) or (a)(7). A vehicle forfeited under (a)(6) or (a)(4) is the same profit to the sovereign and is not remedial to anyone. Curiously, the petition and amicus brief neglects to mention their profit motive.

Thus, the most sensible and economical method, as well as that which is consistent with legislative intent and precedent of this Court, is to find that § 881(a)(6) is also categorically "punishment."

Accordingly, prompt review by this Court and affirmance of the decision below is requested in order to settle the Question Presented herein.

5. It is important that the petition be granted and the decision below affirmed because of the salutary effects and economy benefits to the administration of justice resulting from the decision.

The salutary effects and economic benefits of the Ninth Circuit's decision are significant in the area of judicial and prosecutorial economy, property rights, constitutional rights of innocent and guilty owners of property involved in seizure, and restoration of integrity to the asset forfeiture program.

(a) The federal and state prosecutors are now routinely bringing their asset forfeiture action within the criminal indictment, or by civil in rem forfeiture proceedings, but not both. There will be tremendous savings if prosecutors only have to docket and prepare one case instead of two or more on

the same criminal allegations. It is likewise logical that prosecutors will enjoy huge savings in man-hours previously wasted on conducting dual civil and criminal proceedings against the same defendant. Adding a criminal forfeiture count to the proposed indictment for the grand jury is already a well-established practice.

Court clerks will save time and money with less new civil forfeiture dockets to manage when criminal forfeiture counts are brought in the criminal indictment.

Judicial economy is a logical result when only one action is brought to forfeit property, either by criminal indictment and prosecution, or in a civil proceedings. Previous to the Ninth Circuit, decision, two judges were often involved in the same claim. It is economical to have one district judge handle the government's action for civil forfeiture, or criminal indictment with a forfeiture count.

It is beyond dispute now that the government can obtain all the relief it wishes, both in a criminal sentences and property forfeiture, in one proceedings.

(b) The petitioner's use of dual criminal and civil proceedings to punish persons involved in drug law violations has radically shifted the ownership of real and personal property from citizens to the government for its use. The government can seize real and personal property and place the burden of the owner to provide his lack of guilt. there is no appointment of counsel for civil forfeiture of property at this time. The area of property law and property rights had become unstable when the petitioner can bring repeated actions for property forfeiture after criminal punishment. Alienability of property has been adversely affected. Private property is taken for official use. The Third and Fifth Amendments of the Constitution are noteworthy. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner to be prescribed by law." Amendment III (1791). "No person...nor be deprived of life, liberty, or property, without due process of law;nor shall property be taken for public use, without just compensation. Amendment V (1971).

The petitioner asks this Court to wink at what is really going on, and to continue a fading historical fiction that a forfeiture action is one against inanimate property rather than the guilty owner.

There is a need for scrutiny of forfeiture doctrine. It has been

commented by this Court that, "[i]ndividual freedom finds tangible expression in property rights." U.S. v. James Daniel Good Real Property, 114 S.Ct. 492, 505 (1993); Id at 515 (Thomas, J. concurring in part and dissenting in part).

"Any system that wishes to protect freedom, has to protect property."[24] The Second Circuit has stated that it "continue[s] to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." United States v. $31,990 In United States Currency, 982 F.2d 851, 856 (2nd Cir. 1993).

The Ninth Circuit's decision has injected an element of stability and certainty into the area of property rights of persons accused of a drug or money laundering crime. Now, there will be only one proceeding for the properties and the crime.

(c) The salutary effects of the Ninth Circuit's decision on Constitutional rights and a reappearance of integrity into the judicial system are already noticeable. The petitioner has lost nothing. The petitioner has merely brought the forfeiture and criminal charges in the indictment for a determination in one proceedings, in compliance with the Fifth Amendment so "that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." $405,089.23, 33 F.3d at 1215, [Pet.App. 6a] quoting Abbate v. United States, 359 U.S. 187, 188-89 (1959) (Opinion by Brennan, J.).

The decision is important to those accused of a drug law violation since the accused cannot effectively protect his property rights and liberty interest from a jail cell. Be requiring a defendant to "marshal his resources" for defenses of his liberty in the criminal prosecution, and to again "marshal his resources" in the separate forfeiture proceedings to protect his property rights from the same claim is exactly the protections provided for under the Double Jeopardy Clause. The failure to "marshal his resources" to fight the civil forfeiture of property because the state will not provide counsel except for the criminal prosecution, causes many defendants to lose valuable real and personal property simply because of the elected manipulative strategy of the petitioner to conduct dual proceedings against the defendant for the same cause of action.

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[24] George C. Pratt & William B. Peterson, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991).

In the instant case, the petition should be granted and the decision affirmed in order to restore the tarnished appearance of integrity in the forfeiture laws. Unfairness and overreaching have been the trademark and image of the petitioner's and amici's asset forfeiture programs since big profit is the motivation to us in rem forfeiture actions based on the same conduct that a defendant is criminally indicted and prosecuted for. The petitioner's and amici's claim of "chill" and impairment to their asset forfeiture programs can most charitably be called "transparently fallacious."

(d) The petition and amici brief in support of the petition urge suspension of a constitutional right so that they can maintain profitable programs by shortcuts that give them tremendous procedural advantage in dual proceedings from the same action against same person. There is an appearance of unfairness and a conflict of interest.

The drug war's asset forfeiture program have been utilized by the petitioner to amass billions of dollars in seized properties based on probable cause that the owner had violated one of the drug laws. The news medical is frequently reporting cases of abusive tactics and losses of real and personal property of innocent owners. Id. Property rights traditionally have been an important area of law and are protected by Constitutional guarantee against a "taking" without due process. Homes are seized under the drug laws with a great deal less protection and procedural safeguards than a condemnation proceedings or as an exercise of eminent domain.

The use of civil statutes for punishment of crime raises genuine civil liberties issues, and when confiscation of property is the punishment, deeply rooted property rights issues arise. The government's overzealous forfeiture efforts have recently been criticized by the courts, the medica, legal commentators, bar associations, civil liberties organizations, some members of Congress, and even some prosecutors responsible for leading and directing the federal forfeiture program. After many years of relentless expansion, the forfeiture laws are in for a long overdue review by the courts. There is a widely perceived need to reform these laws and the way they are being implemented to make them fairer and to prevent the kind of abuses that have occurred regularly. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 1.02, 1-18 to 1-22 (1995).

Since 1990, media coverage of forfeiture actions by the government has turned distinctly negative focusing on the victims of overzealous forfeiture

efforts and unfairness of civil forfeiture proceedings.[25] Id.

The Comprehensive Crime Control Act of 1984 earmarked forfeiture assets exclusively for law enforcement purposes. See 28 U.S.C. § 524. prior to 1984, the proceeds from forfeited assets were deposited in the general Treasury. The allotting of forfeited assets for law enforcement purposes provided a tremendous incentive to seek forfeiture simply to raise revenue for law enforcement agencies. The interest of justice and traditional law enforcement priorities were soon slighted in the government's overzealous pursuit of forfeiture. The priorities of state and local law enforcement to share its forfeiture booty with cooperating state and local law enforcement agencies. See 19 U.S.C. § 1616.[26] Thus, the earmarking of forfeiture assets for the benefit of local law enforcement agencies that seize the property has been criticized by some judges because of the built-in conflict of interest inviting

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[25] How the Long Arm of the Las Can Seize What It Wants, The Philadelphia Inquirer, Feb. 18, 1990, at 1-A; Drug Raids Net Much Valuable Property--and Legal Uproar, The Washington Post, April 1, 1991 at A1; Small Amounts of Drugs Can Put Driver's Cars Behind Bars, The News and Observer, July 30, 1990, at A1; Presumed Guilty--The Law's Victims in the War on Drugs, The Pittsburgh Press, Aug. 11-16, 1991 (seven part series of articles); Special Report: Abusing Forfeiture Laws: Are Seizures "Legalized Theft"?, USA Today May 18, 1992, at A-1; Forfeiture Laws Seize National Scorn, Orlando Sentinel, Aug. 2, 1992, at A-1; Where the Innocent Lose, Newsweek, Jan. 4, 1993 at 42-43; Civil Forfeiture Laws are Under Attack, Wall Street Journal, Jan. 14, 1993, at B-1; Reining in Property Seizures by Police, March 22, 1993 at 1; The Law Goes on a Treasure Hunt, The New York Times Magazine, Dec. 11, 1994; $60 Million Theft by Sheriff's Deputies Alleged, L.A. Times, April 1, 1993 at B1; Special Report: The Forfeiture Racket, by Gary Webb, San Jose Mercury News, Aug & Sept. 1993 (Weapon in Drug War Bludgeons Innocent); Widespread Abuse Taints Anti-Drug Law, Aug. 29, 1993; The Money Tree, Aug. 30, 191; Police Lobbying to Save State Asset Forfeiture Law, Sept. 7, 1993; Vote Set Today on Measure to Limit Asset Seizures in Drug Cases, Sept. 1993; Lawmakers Revoke Cops' Asset-Seizing Powers, Sept. 11, 1993); Tainted Cash or Easy Money, Orlando Sentinel, June 14, 1992 at A-1; The Thin Green Line, California Lawyer, September 1994, at 48-49; Why Good Cops Go Bad, Newsweek, Dec. 19, 1994 at 30-34; Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform, Legal Times, July 5, 1993 at 21; Uncle Sam Wants Your Stuff: Is Asset Forfeiture Another Term For Theft, by J. Bovard, Playboy Magazine, October 1995, at 45-47.

[26] See also, Attorney General's Guidelines on Seized and forfeited property.

overreaching.[27] United States v. That Certain Real Property, 798 F.Supp 1540 1551 (N.D.Ala. 1992); Jones v. Drug Enforcement Administration, 819 F.Supp 698 (M.D.Tenn. 1993); United States v. Currency in the Amount of $150,660.00, 980 F.2d 1200, 1208 (8th Cir. 1992)(Bright, J., dissenting). Recently, one judge suggested it was time to reevaluate dual sovereignty fiction in federal-state criminal-civil forfeiture dual actions arising from joint operations on the defendant and offense. United States v. G & P Automotive, LLR 1995, U.S. 2nd Cir. 416, Subsection II b.2 separate concurrence by Calabresi, J., citing United States v. Grimes, 641 F2d 96, 101 (3rd Cir. 1981).

Thus, the petitioner and the amici prosecutors supporting the petition are vigorously arguing that their profit-making asset-forfeiture programs should not be hampered by the Constitution. By merely labeling a forfeiture "proceeds," the petitioner and amici hope to continue a fiction that loss of property rights, based on a criminal violation allegation, is not a punishment of the guilty owner. The petition has artfully avoided discussing its profit motive in this action. The petitioner and amici want this Court's blessing to seek profit by ignoring the text of the statute and legislative intent that forfeiture of property rights under § 881(a)(6) is a punishment.

The petitioner and the amici have significant, direct, pecuniary interests in maintaining their unfettered and uncontrolled asset-enrichment programs without regard to the protection of the Constitution for individual liberty and property interests. Since there is "equitable sharing" of the loot (see footnote 27 supra), there is no rational reason that the same petitioner and amici could not have conducted asset forfeiture in a single proceeding, either by criminal forfeiture statutes in the criminal indictment, or by civil action to punish the non-indicted property owner.

CONCLUSION

The petition and the amicus brief understandably do not mention all the circuits which have agreed with the Ninth Circuit, and the effect of Halper, Austin, and Kurth Ranch. Independently, the Seventh Circuit reached a similar conclusion in United States v. Torres, 28 F.3d 1463 (7th Cir. 1994). See also,

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[27] By Fiscal Year 1990, the Justice Department was doling out about $200 million a year to state and local police and sheriff's departments nation wide through the "equitable sharing" programs. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 1.01, at 1-8. Understandably, the amicus brief does not mention its financial stake.

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995); United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995) No 95-1202 (where the principle of law was affirmed, but the defendant lost because of the facts of that case). The District of Columbia Circuit recently recognized that Austin and Kurth Ranch required it to change its prior holding that The Double Jeopardy Clause did not apply to proceedings under 21 U.S.C. § 881(a)(6) in United States v. Rhodes, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

If the petitioner's and amici's profit-motivated programs of asset forfeiture are "chilled" because of the Constitution as they claim, then those programs must be corrected to meet constitutional muster to protect citizens' liberty and property interests. The statutory tools already exist to accomplish the task correctly and that the petitioner and amici can properly accomplish asset-forfeiture and have the rewards. The petition should be granted and the decision below affirmed on the merits.

Dated: November 21, 1995

Respectfully submitted,

/s/
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APPENDIX A

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. $405,089.23 U. S. CURRENCY; $8,929.93 U. S. CURRENCY; $123,000 U.S. CURRENCY; ONE BELL 47 G-2 HELICOPTER, U.S. Registration Number N59H; STORMY SEAS FOUR (SHRIMP BOAT) official number 2159; ONE PIPER CHEROKEE 6 AIRPLANE; ONE HUNDRED THIRTY-EIGHT (138) SILVER BARS; ONE 1985 JAGUAR, VIN: SAJNV5842FC119348; ONE 1981 WELLCRAFT, VIN: HALLWELT1593G788; ONE 1988 JAGUAR, VIN: SAJHU164JC530324; ONE 1986 PORSCHE, VIN: WPOAA0940GN454897; ONE 1988 JAGUAR, VIN: SAJAV1643JC521364; ONE 1986 CHEVROLET, VIN: 1G8CS18RXG0140772; ONE 1988 MITSUBISHI, VIN: JA7FL24D9JP0505914; ONE 1987 NISSAN, VIN: JN6ND11S3HW033709;	No. CV 91-3264 AWT(EEx) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MARK A. FELDMAN

57

Resp. App.
1a

ONE 1987 SUZUKI, VIN: 1S4JC51C2H4154485; ONE 1988 Jeep, VIN: 2BCHV8157JB523469; ONE 1988 Chevrolet, VIN: 1GCFC24K0JZ253793; ONE 1983 Chevrolet, VIN: 1G8CS18B9D8132968, Defendants.	Date: December 28, 1992 Time: 10:00 a.m. Place: Courtroom of the Honorable A. Wallace Tashima

NOTICE IS HEREBY GIVEN that on December 28, 1992 at 10:00 a.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable Judge A. Wallace Tashima, United States District Judge, located at 312 North Spring Street, Los Angeles, California, the United States of America, plaintiff, will move for Summary Judgment on its Complaint for Forfeiture herein. This motion is made on the grounds that there are no genuine issues of material fact. Accordingly, plaintiff is entitled to judgment as a matter of law.

The motion is made pursuant to Rule 56, Federal Rules of Civil Procedure, and Local Rule 7.14 and is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the Statement of Uncontroverted Facts and Conclusions of Law filed concurrently herewith, the pleadings and papers on file in this action, and upon such

58

Resp. App. 2a

further evidence, oral or documentary as may be presented prior to or at the hearing on this motion.

DATED: December 4, 1992

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Resp. App.
3a

TABLE OF AUTHORITIES

Cases:	PAGE
$83,310.78 in U.S. Currency, 851 F.2d at 1231 (9th Cir. 1988)	13, 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	11
United States of America v. All Monies, 754 F. Supp. 1467 (D. Haw. 1991)	Passim
United States of America v. Certain Funds on Deposit, 769 F. Supp. 80 (E.D.N.Y. 1991)	22
United States of America v. Dickerson, 873 F.2d 1181 (9th Cir. 1988)	13
United States of America v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276 (9th Cir. 1983)	Passim
United States of America v. Padilla, 888 F.2d 642 (9th Cir. 1989)	20
United States of America v. Thomas, 913 F.2d 1111 (4th Cir. 1990)	15
United States v. 4643 W. Kennedy Blvd., No. 90-46-Civ-T-13, slip op., 1990 WL305391 [M.D.Fla. Feb. 12, 1990]	23
United States of America v. 1982 Yukon Delta Houseboat, 774 F.2d 1432 (9th Cir. 1985)	14
United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357 (9th Cir. 1986)	11, 12, 14
United States of America v. $29,959 U.S. Currency, 931 F.2d 549 (9th Cir. 1991)	15
United States of America v. $83,310.78 in U.S. Currency, 851 F.2d 1231 (9th Cir. 1988)	13
United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984)	13, 14
United States of America v. $488,342.85 U.S. Currency, 969 F.2d 475 (7th Cir. 1992)	23

60

Resp. App.
4a

TABLE OF AUTHORITIES

Statutes:	PAGE
Title 18 U.S.C. § 981.	4, 24
Title 18 U.S.C. § 981(a)(1)	17
Title 18 U.S.C. § 981(a)(1)(A)	17, 22, 23
Title 18 U.S.C. § 1956	4, 25
Title 18 U.S.C. § 1956(a)(1)	6, 15
Title 18 U.S.C. § 1956(a)(1)(B)	17
Title 19 U.S.C. § 1615	12
Title 21 U.S.C. § 881(a)	13
Title 21 U.S.C. § 881(a)(6).	4, 17

TABLE OF CONTENTS

"PAGE"

TABLE OF AUTHORITIES i

MEMORANDUM OF POINTS AND AUTHORITIES 4

I SUMMARY 4

II FACTUAL BACKGROUND 5

A ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION 5

B. TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE 6

1. Defendant Properties Specifically Addressed in The Criminal Case 6

a. SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23 6

b. $123,000 IN U.S. CURRENCY 7

2. Properties Not Specifically Addressed in Criminal Case 7

a. 138 Silver Bars 7

b. BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-04649; 01964-04854 . . 8

c. BELL 47 HELICOPTER -- U.S. REGISTRATION NUMBER - N 59 H 8

d. STORMY SEAS FOUR (SHRIMP BOAT) - OFFICIAL NUMBER 2159 9

e. PIPER CHEROKEE 6 AIRPLANE 9

f. ELEVEN AUTOMOBILES AND ONE BOAT 10

III ARGUMENT 11

A. PLAINTIFF MUST ESTABLISH PROBABLE CAUSE TO BE ENTITLED TO SUMMARY JUDGMENT 11

1. Defendant Properties Are Forfeitable On Narcotics "Proceeds Theory" 12

a. Plaintiff's probable cause burden 12

b. Reliance upon circumstantial evidence and hearsay 14

Resp. App. 6a

TABLE OF CONTENTS

"PAGE"

c. Probable cause is judged by the aggregate of facts 14

2. Defendant properties also are forfeitable on money laundering theory 17

a. The Statutory Framework 18

b. Defendants Were "Involved In" or Derived from Violations of Section 1956 and Therefore Are Forfeitable . . . 19

c. Three bank accounts were used to facilitate money laundering of narcotics proceeds, therefore funds in accounts are forfeitable 21

IV CONCLUSION 25

DECLARATION OF MARK A. FELDMAN 26

Resp. App. 7a

MEMORANDUM OF POINTS AND AUTHORITIES

I

SUMMARY

1. This in rem forfeiture action was brought against the defendant properties pursuant to Section 881 of Title 21 and Section 981 of Title 18 of the United States Code. Specifically, the government contends that the defendant properties are forfeitable because they represent items traceable to illegal narcotics activities in violation of 21 U.S.C. 881(a)(6) and because the defendants were involved in financial transactions in violation of 18 U.S.C. §§ 981 and 1956.

2. Claims have been filed in this action by Charles Arlt ("Arlt"), James Wren ("Wren") and Payback Mines. Arlt and his associates, including but not limited to, Wren, James Rocky Hill ("Hill"), Deanna Marie Pierce ("Pierce"), Robert Kuhnle ("Kuhnle"), Anita Gage ("Gage") and Daryl House ("House") were in the business of purchasing chemicals used to manufacture methamphetamine. See Exh. 1 at 2-4.

3. Arlt, Wren and Hill were convicted of over fifteen criminal violations, including conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering. See Exh. 1 at 2-4.

Resp. App. 8a

II

FACTUAL BACKGROUND

A ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION

1. Arlt and his associates purchased cashier's checks, transferred funds and caused the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals used in the manufacture of methamphetamine.[1] Exh. 1 at ¶¶ 8, 12, 15, 18, 19, 21 (and Count 18), 23, 26 (and Count 10), 26, 27 (and Count 3), 31 (and Count 11), 31, 32 (and Count 4), 36, 37 (and Count 19), 39, 40 (and Count 12), 41 (and Count 5), 46, 47 (and Count 13), 48 (and Count 6), 51, 52 (and Count 14), 53 (and Count 7), 55 (and Count 20), 67 (and Count 15), 68 (and Count 8), 71, 72 (and Count 16), 73 (and Count 9), 78, 79 (and Count 17), 85 (and Count 21), 86, 87 (and Count 22).

2. Arlt and his associates made direct purchases of and ordered chemicals used in the manufacture of methamphetamine. See Exh. 1 at ¶¶ 1-6, 11, 14, 17, 22, 25, 29, 35, 38, 45, 50, 60, 62, 70, 77 (and Count 1).

3. Arlt and his associates stored the chemicals in storage facilities, distributed and arranged for and took delivery of the chemicals. See Exh. 1 at ¶¶ 9, 10, 13, 16, 20, 24, 28, 42, 43, 49, 54, 64, 69, 74, 75, 76, 81, 83, 91, 92 (and Count 1).

4. Arlt purchased and/or established several business entities which he used to transact business, including Highland

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[1] All references are to paragraphs ("Overt Acts") contained in the First Superseding Indictment ("Indictment") and the Count in the Indictment associated with the specific Overt Act. A certified copy of which is attached as Exhibit 1.

Resp. App. 9a

Towing, Inc., AAA Minerals and claimant Payback Mines. Exh. 3 at 5, ¶ 1.

5. Arlt and his associates attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by Arlt in Nevada and California. No such mining operations in fact existed. Exh. 3 at 5, ¶ 2.

6. Arlt, Wren and Hill were convicted on each and every count alleged against them in the Indictment. See Exhs. 1, 2. On March 27, 1992, Arlt was convicted of nineteen counts of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and of money laundering in violation of 18 U.S.C. § 1956(a)(1), and Wren was convicted of fifteen counts of the same criminal violations. Id. In addition, James Hill was convicted of conspiracy to manufacture methamphetamine and of laundering approximately $400,000, in violation of 18 U.S.C. § 1956(a)(1). Id. This act of laundering involved the $405,089.23 that is the first defendant listed in the caption in this case.

8. Arlt, Wren and Hill were convicted of laundering approximately $1,630,000 from July 1990 through March 1991.

B. TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE

1. Defendant Properties Specifically Addressed in The Criminal Case

a. SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23

9. Count 22 of the Indictment charged Hill with

Resp. App. 10a

attempting to launder approximately $400,000. Hill was convicted of attempting to launder these funds. See Exhs. 1, 2; Exh. 3 at ¶¶ 115, 116.

b. $123,000 IN U.S. CURRENCY

10. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. A cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant. See Exh. 3 at ¶ 125.

11. Count 2 of the Indictment, in Paragraph 84, accused Wren of transporting $123,000 from Security Pacific to Mayhill Bail Bonds. See Exh. 1 at ¶ 84.

12. Wren was convicted on Count 2 of the Indictment. See Exhs. 1, 2.

2. Properties Not Specifically Addressed in Criminal Case

a. 138 Silver Bars

13. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. See Exh. 3 at ¶ 125. In addition to the above-mentioned $123,000, 138 silver bars were seized during the search. Id. The total weight of these bars is approximately 13,479 ounces, having a total value of approximately $59,040. Id.

14. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. See Exh. 3 at ¶ 126. Millie Mayhill ("Mayhill") was read her Miranda warning and she consented to a taped discussion. Id. During this taped conversation with Mayhill, Mayhill advised that her brother is Jim Wren. Id. Mayhill

Resp. App. 11a

explained that in January 1991 Wren brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room." Id.

15. Mayhill stated that she had known "FAT CHUCK", whose real name is Charles Arlt, for three years as Arlt would come to her business to bail a lot of his people out of jail. See Exh. 3 at ¶ 127.

b. **BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-04649; 01964-04854**

16. Two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be Arlt, Wren and Hill. See Exh. 3 at ¶ 117. Highland Towing was a business entity owned and controlled by Arlt. See Exh. 3 at ¶ 90.

17. On March 28, 1991, Wren opened a third account in the name of Payback Mines, which was a business entity owned by Arlt. See Exh. 3 at ¶¶ 117, 109. Only Jim and Regina Wren had signature authority on this account. Id. This account, no. 01964-04854, was supposed to receive the $405,089.23 that was the subject of Hill's money laundering conviction under Count 22. See Exh. 3 at ¶¶ 115, 117.

c. **BELL 47 HELICOPTER -- U.S. REGISTRATION NUMBER - N 59 H**

18. On Sunday, January 20, 1991, a man who introduced himself as Wren came to Edward Mauldin's place of business, named Sundance Helicopters, to purchase a helicopter. See Exh. 3 at ¶ 118. After taking Wren and an associate of Wren's for a

Resp. App. 12a

test flight, Wren agreed to purchase the helicopter for $65,000. Id. Wren presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in Wren's briefcase. Id. Most of the cash was in $100 bills with some in $50 and $20 denominations. Id.; Exh. 4.

19. Wren requested that the helicopter be registered in the name of Payback Mines. See Exh. 3 at ¶ 119. Wren also signed the bill of sale, signing as the vice president of Payback Mines. Id. Mr. Mauldin witnessed Wren's signature and mailed the completed bill of sale to the FAA. Id.

d. STORMY SEAS FOUR (SHRIMP BOAT) - OFFICIAL NUMBER 2159

21. On or around January 30, 1991, Wren purchased this boat at an auction for $51,700. Exh. 3 at 121.

22. Wren paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Exh. 3 at ¶ 122. Most of the bills were in small denominations. Id. While counting the money one of Wren's associates, earlier identified as his son, pulled out a gun and laid it on the table for an unstated reason. Id. The boat was in dry dock for repairs in Biloxi, Mississippi immediately before being seized by federal agents of the IRS. Id.

e. PIPER CHEROKEE 6 AIRPLANE

23. On or about Sunday, December 30, 1990, Wren and Arlt came to Larry Oyers' business, named Western Cardinal, Inc., to look at a Piper Cherokee 6 airplane. See Exh. 3 at ¶ 123. On or about Monday, January 7, 1991, Oyers received a telephone call from Wren, who stated that Arlt wanted to buy the airplane

Resp. App. 13a

on that day. Id. Wren and Oyers met at Redlands Aviation on January 7, 1991. Id. After an inspection of the airplane the two drove to Highland Towing Company. Id. After agreeing on a price of $32,000, Wren presented Oyers with a brown paper bag containing $32,000 in U.S. currency. Id. According to Oyers, most of the cash was in small denominations. Id.

24. Wren requested that the airplane be registered in the name of Payback Mines. See Exh. 3 at ¶ 124. Oyers witnessed Wren sign the bill of sale as vice president of Payback Mines. Id.

f. ELEVEN AUTOMOBILES AND ONE BOAT

25. On February 1, 1991, Wren purchased eleven cars and one boat from an auction, for a total of approximately $105,000. See Exh. 3 at ¶ 128; Exh. 5. Wren paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. See Exh. 3 at ¶ 128; Exh. 5 at 1 (Arlt executed Form 8300 as authorized to sign on behalf of Payback Mines). Wren registered all of the cars to Payback Mines at 27110 East Third Street, the address of Highland Towing. See Exh. 3 at ¶ 128.

26. Arlt was with Wren when he made the above-described purchase. See Exh. 3 at ¶ 129.

27. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with Wren and Arlt. See Exh. 3 at ¶ 130. Mr. Martin said that Arlt signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. Id.; See Exh. 5 at 1. Arlt had Wren sign the Department of Motor Vehicle documents for the vehicles. Id. Mr. Martin recalled that the cash used to purchase the vehicles

Resp. App. 14a

was in twenties and hundreds, and was inside a very dirty brown paper bag. Id. Mr. Martin felt that Arlt was directing the transaction as Wren filled out some documents and a female that was with them filled out other documents. Id.

28. On or about May 2, 1991, each of the defendant properties was seized pursuant to seizure warrants. See Exh 6, a copy of each of the 20 seizure warrants.

III

ARGUMENT

A. PLAINTIFF MUST ESTABLISH PROBABLE CAUSE TO BE ENTITLED TO SUMMARY JUDGMENT

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thus, the government must first establish probable cause to believe that the defendant properties are forfeitable.

Unless claimants then are able to establish that the defendant properties were derived from a legitimate source, rather than from proceeds of claimants' methamphetamine activities, a summary judgment of forfeiture is appropriate.

> [T]he summary judgment procedures under Rule 56, Fed.R.Civ.P., must necessarily be construed in the light of the statutory law of forfeitures, and particularly the procedural requirements set forth therein. . . .

United States v. $5,644,540 U.S. Currency, 799 F.2d 1357, 1361

Resp. App. 15a

(9th Cir. 1986) (citing United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1983)).

1. Defendant Properties Are Forfeitable On Narcotics "Proceeds Theory"

Title 21 section 881(a)(6) of the United States Code provides for forfeiture to the United States of the following:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

a. Plaintiff's probable cause burden

The burden of proof in civil forfeiture actions is set forth in 19 U.S.C. § 1615. United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986). Section 1615 provides that to succeed in an action for

Resp. App. 16a

forfeiture it is the plaintiff who has the initial burden. To satisfy this burden plaintiff must establish probable cause. In a civil forfeiture action under 21 U.S.C. § 881(a) the "government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction." Id. at 1362; United States of America v. Dickerson, 873 F.2d 1181, 1184 (9th Cir. 1988).

Probable cause is a question of law to be decided by the court. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984); United States of America v. Padilla, 888 F.2d 642, 643 (9th Cir. 1989).

It is well established that the standard for showing probable cause in a civil forfeiture case is no greater than for a search warrant. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1984). Plaintiff must show that there is more than a mere suspicion that the real property is connected to illegal drug transactions. "Probable cause is shown if the government produces 'less than prima facie proof but more than mere suspicion.'" United States of America v. $83,310.78 in U.S. Currency, 851 F.2d 1231, 1235 (9th Cir. 1988) (citation omitted).

In $83,310.78 in U.S. Currency, the court upheld a judgment of forfeiture after concluding that the "government had shown that there was more than a mere suspicion that the seized currency was connected to an illegal drug transaction." Id. at 1235 (emphasis added).

Resp. App. 17a

b. Reliance upon circumstantial evidence and hearsay

To make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties were connected to drug transactions. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983).

Plaintiff may make its probable cause showing by relying upon circumstantial evidence. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984). Furthermore, such evidence need not be admissible at trial if the court deems it adequate and sufficiently reliable. United States of America v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1434 (9th Cir. 1985).[2] "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." Tahuna, 702 F.2d at 1283.

c. Probable cause is judged by the aggregate of facts

In deciding whether the United States has established probable cause, the Court must look to the aggregate of facts. United States v. $83,310.78 in U.S. Currency, 851 F.2d 1231 (9th Cir. 1988); United States v. $5,644,540 U.S. Currency, 799 F.2d 1362.

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[2] Accordingly, reliance on the Affidavit of Special Agent Mullins, the Indictment and Criminal Minutes, and other documentary evidence is appropriate. Id. at 1282-83.

Resp. App. 18a

> Probable cause is shown if 'the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or intended to be exchanged for drugs.'

$83,310.78, 851 F.2d at 1235 (citing $5,644,540 U.S. Currency.)

In United States v. $29,959 U.S. Currency, 931 F.2d 549, 553 (9th Cir. 1991), the court held that possession of large amounts of currency is strong evidence of drug trafficking.

> Cash amounting to $29,959 is an 'extremely large amount' to be kept in the home. . . This alone is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.

Similarly, the use of large amounts of cash to purchase properties is evidence of drug trafficking and that drug proceeds were used to purchase such properties. See United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990).

The convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and money laundering are sufficient for probable cause by themselves. Nevertheless, with each of the defendant properties, other than the $405,089.23 and the silver bars, there is additional evidence that clearly establishes probable cause.

First, with regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. This conviction, under 18 U.S.C. § 1956(a)(1), required that the defendant money was obtained from an unlawful

Resp. App. 19a

activity, that being methamphetamine trafficking.

Second, Wren was convicted on Count 2 of the Indictment, which incorporates Paragraph 84, relating to the $123,000 that Wren transported to Mayhill Bail Bonds. Furthermore, the extremely large amount of currency itself bolsters the existence of probable cause.

Third, the $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on these accounts, indicating that the money was a proceed of their methamphetamine trafficking. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. The fact that this account was also in the name of one of Arlt's companies, also supports the finding of probable cause. See Exh. 3 at ¶ 117.

Fourth, probable cause for the Bell 47 Helicopter is further supported by the fact that it was purchased with cash for $65,000. Furthermore, the aircraft was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 119; See Exh. 5 at 1 (bottom of document indicates that Arlt signed on behalf of Payback Mines.) See Exh. at ¶¶ 118-119.

Fifth, forfeiture of the Stormy Seas Four shrimp boat is further supported by the fact that it was purchased with $51,700 in currency. Like the helicopter, this fishing vessel was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 122.

Sixth, probable cause for the Piper 6 Cherokee Airplane is

Resp. App. 20a

bolstered by the purchase of the aircraft with $32,000 in currency. Like the above two properties, the airplane also was placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 123-124.

Seventh, the eleven automobiles and one boat were purchased with $105,000 in cash at an auction. Like the above helicopter, fishing vessel and airplane, the eleven vehicles and one boat also were placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 128-130.

For the above stated reasons, plaintiff submits that it has established probable cause to believe that each of the defendant properties is forfeitable as a proceed of claimants' illegal narcotics activities, under 21 U.S.C. § 881(a)(6).

2. Defendant properties also are forfeitable on money laundering theory

Plaintiff also alleges that the defendant properties are forfeitable under 18 U.S.C. § 981(a)(1). Pursuant to section 981(a)(1)(A), if the defendant properties were "involved in" or are traceable to properties involved in violations of 18 U.S.C. § 1956(a)(1)(B), such properties are forfeitable to the government.

The defendant properties were "involved in" or traceable to violations of 18 U.S.C. § 1956(a)(1)(B) if: the defendant properties were derived from a "specified unlawful activity", namely, the manufacture and sale of methamphetamine; and, the defendants were involved in financial transactions designed to conceal the nature, location, source, ownership, or control of the funds.

Resp. App. 21a

a. The Statutory Framework

Title 18 section 981(a)(1)(A) of the United States Code provides for forfeiture to the United States of the following:

> Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

Id. (emphasis added).

Title 18, section 1956(a)(1) defines money laundering as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

The term "specified unlawful activity" includes the

Resp. App. 22 a

violation of the federal narcotics laws. [3]

As stated above, claimants were convicted of numerous counts of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering.

b. Defendants Were "Involved In" or Derived from Violations of Section 1956 and Therefore Are Forfeitable

To be entitled to summary judgment, the government must establish probable cause to believe that the defendant properties were "involved in" or are traceable to money laundering violations; that each was derived from a "specified unlawful activity", methamphetamine activities for instance, and that each of the defendant properties was involved in financial transactions designed to conceal the location, source, ownership and control of that defendant property. United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991); United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

As stated above, to make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties represent the proceeds of claimant's methamphetamine activities. See United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983); United States v. All Monies, 754 F. Supp. 1467, 1471 (D.

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[3] The term "specified unlawful activity" is defined in section 1956(c)(7)(A), and includes "any act or activity constituting an offense listed in § 1961(1) of this title . . ." Section 1961(1)(D) includes "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States."

Resp. App. 23 a

Haw. 1991). The standard for establishing probable cause is more than a mere suspicion but less than a preponderance of the evidence. All Monies, 754 F. Supp. at 1471; United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

The defendant properties were involved in financial transactions designed to conceal the location, source or the ownership of the defendant properties or were traceable to such transactions.

First, with regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. Therefore, it is automatically forfeitable.

Second, Wren was convicted of conspiracy to commit money laundering in Count 2 of the indictment, which incorporates Paragraph 84. Paragraph 84 alleged that Wren transported $123,000 from Security Pacific Bank to Mayhill Bail Bonds.

Third, the $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on this account, which supports the conclusion that the money was "involved in" or traceable to their methamphetamine activities. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. This fact also supports the conclusion that the funds were traceable to methamphetamine activities. Therefore, it also supports the finding of probable cause. See Exh. 3 at ¶ 117.

Fourth, the Bell 47 Helicopter was involved in or is traceable to a $65,000 cash transaction, designed to conceal the

Resp. App. 24a

source, ownership, and control of the property. See Exh. 3 at ¶ 118.

Fifth, the Stormy Seas Shrimp boat was involved in or is traceable to a $51,700 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 122.

Sixth, the Piper 6 Cherokee Airplane was involved in or traceable to a $32,000 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 123.

Seventh, the eleven automobiles and one boat were involved in or are traceable to a $105,000 cash transaction designed to conceal the source, ownership, and control of the properties. See Exh. 3 at ¶ 129.

a. Three bank accounts were used to facilitate money laundering of narcotics proceeds, therefore funds in accounts are forfeitable

As stated above, the government seized three bank accounts containing funds involved in financial transactions. Although there are very few reported opinions interpreting Title 18 section 981(a)(1), the government submits that property used to "facilitate" illegal money laundering, including a bank account, is forfeitable to the government.

This interpretation of section 981(a)(1)(A) is made clear by the legislative history of the statute.

> [T]he term "property involved in" is intended to include the money or other property being laundered (the corpus), any

Resp. App. 25a

> commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.

134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (emphasis added). In United States v. All Monies, 754 F. Supp. 1467 (D. Haw. 1991), the court held that forfeiture of an entire bank account used to launder narcotics proceeds was appropriate under 18 U.S.C. § 981(a)(1)(A).

> This Court finds that 18 U.S.C. § 981(a)(1)(A) applies to all property that facilitates violations of §§ 1956 and 1957. Even though § 981 does not expressly include the words "facilitate" or "facilitating," the statute covers property "involved in" illegal money laundering transactions. . . The legislative history makes it clear that "property involved in" includes property used to facilitate money laundering offenses.

Id. at 1473.

In United States v. Certain Funds on Deposit, 769 F. Supp. 80 (E.D.N.Y. 1991), the court adopted the reasoning of the All Monies case. Interpreting 18 U.S.C. § 981(a)(1)(A), the court held that:

> This section has been construed by the district courts as authorizing the forfeiture of an entire bank account or business which was used to "facilitate" the

Resp. App. 26 a

> laundering of money in violation of 18 U.S.C. § 981(a)(1)(A).

Id. at 84 (citing All Monies, supra; United States v. 4643 W. Kennedy Blvd., No. 90-46-Civ-T-13, slip op., 1990 WLJ05391 [M.D.Fla. Feb. 12, 1990] (emphasis added).[4]

Each of these three bank accounts was controlled by Arlt. This supports the conclusion that the accounts were used to facilitate the numerous money laundering acts committed by Arlt and his associates. In effect, the accounts were used to "facilitate" the laundering of claimants' methamphetamine proceeds. Thus, the accounts and the money in such accounts is forfeitable.

Even if claimants could establish that they mixed some legitimately obtained money into the accounts containing narcotics proceeds, all of the money in such accounts is forfeitable. In finding that an entire bank account could be forfeited, even if the account contained legitimate deposits, the court in Certain Funds on Deposit reasoned:

> As the government contends, limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money

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[4] In United States v. $488,342.85 U.S. Currency, 969 F.2d 475, 477 (7th Cir. 1992), the court rejected the theory that a bank account may be deemed to "facilitate" money laundering, but upheld summary judgment on the grounds that the criminal proceeds exceeded the amount seized.

Resp. App. 27a

> laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.

Id. at 84-85.

Accordingly, the money seized from these accounts should be forfeited if the bank accounts from which the funds were seized contained narcotics proceeds. Unless claimants can establish with competent evidence that such accounts did not contain funds traceable to narcotics proceeds, the defendant funds must be forfeited to plaintiff.

Plaintiff submits that it has established probable cause to believe that each of the defendant properties, except the silver bars, was involved in a violation of section 1956(a). Therefore, each of the defendant properties, except for the silver bars, is forfeitable under 18 U.S.C. § 981.

Resp. App. 28 a

CONCLUSION

For the foregoing reasons plaintiff asserts that the uncontroverted facts more than establish probable cause to believe that each of the defendant properties is forfeitable as narcotics proceeds under 21 U.S.C. § 881(a)(6) and as properties "involved in" money laundering under 18 U.S.C. § 981(a).

Dated: December 4, 1992

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Resp. App.
29 a

APPENDIX B

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Claimant in pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF CALIFORNIA, Plaintiff, vs $405,089.23 in Currency, et al., Defendants, CHARLES ARLT, JAMES WREN, and PAYBACK MINES., Claimants.	Case No. CV 91-3264 AWT CLAIMANTS' OPPOSITION TO PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACTS AND LAW, and MOTION TO STRIKE

Claimants hereby oppose the plaintiff's memorandum of contentions of fact and law, and move to strike the document as it is merely a repetition of the plaintiff's conclusory and uncorroborated statement of fact and conclusions of law for his motion for summary judgment. The plaintiff's memorandum is identical to its previous motions and, at best is surplusage that offers nothing new or corroborative to its unsupported claims for summary judgment. Therefore, the plaintiff's memorandum should be striken.

However, if this Court does not strike the plaintiff's memorandum, the claimants hereby deny all plaintiff accusations that the

Resp. App. 30 a

defendant properties were the proceeds of any illegal activity, or that they were used, connected to, or involved in, any money laundering activities. Claimants incorporate by reference all of the exhibits that were attached to claimant's cross-motion for summary judgment. The exhibits are referenced herein.

CLAIMANTS' MEMORANDUM OF UNCONTROVERTED FACTS

1. This in rem forfeiture action was brought against the defendant properties pursuant to a claim by the plaintiff under Title 21 U.S.C. § 881 (a)(6) and Title 18 U.S.C. § 981. Specifically, the plaintiff has limited his theory for forfeiture to two theories; first, that the defendant properties are forfeitable because the government claims they represent items traceable to illegal narcotics activities in violation of 21 U.S.C. § 881 (a)(6); and second, because the government claims the defendants were involved in "Financial Transactions in violation of U.S.C. §§ 981 and 1956."

2. Claims have been filed in this action by claimants Charles Arlt ("Arlt") and Jim Wren ("Wren") and Payback Mines. Declarations by claimants Arlt and Wren are submitted herein as evidence, and attached hereto in support of this document.

3. In every single transaction by claimants', or their employees, in which cash, cashier's checks, or money transfers occurred, there was a properly completed and filed Currency Transaction Report, or bank remittance or bank acceptance form, or IRS 1099 form, submitted to the proper authority. The plaintiff knows this fact to be true in every financial transaction, including the wire transfer of funds for the purchase of chemicals for claimants gold recovery solution business. There was never any concealment of names of claimant or the source of the funds, or the use of the chemicals that were purchased.

4. Because of the undeniable fact that a currency transaction

Resp. App. 31 a

report was properly and timely filed in all transactions by claiments in relation to the defendent properties, there is no violation of 18 U.S.C. § 1956, and such behavior is not present here.

5. The claimants have unquestionably never attempted "to conceal or disguise the nature, location, source, ownership or control of..."defendents properties, nor the source and use of those properties. The plaintiff has possession of all sales receipts, purchase orders purchase receipts, vehicle and equipment registrations, and the related banking form or IRS 1099 forms or currency transaction form for every defendent property where required by law and there is no trace of concealment or disguise of ownership. Claiments' have at all times left a wide paper trail like any other legitimate business person(s) would do.

6. Because there was no attempt to "conceal or disguise the nature, location, source, ownership or control of..."the defendents properties, and because prior to arrest the claiments had willingly invited the police to inspect their businesses, there is no violation of 18 U.S.C. § 1956 which plaintiff uses to claim forfeiture under §981. Concealment and disguise of the nature, location, source, ownership or control of the defendents properties is an essential and required element under § 1956, and such behavior is conspicuously absent here.

7. No drugs or drug paraphernalia was present at any of the claimants homes or businesses, and none of the defendant properties were found in connection with the use or presence of drugs or drug paraphernalia. In fact there were no drugs found in the presence of any claimant, nor was there any witness ever to claim that the defendant properties were the proceeds from any drug business. The only "witnesses" that the plaintiff can ever produce is a government agent with suspicions and conclusions. There is not even circumstantial evidence.

Resp. App. 32 a

8. Claimant Arlt has been in the gold mining business for over twenty (20) years which is verifiable and undisputed by plaintiff. Claimant Arlt has developed a gold recovery chemical solution (similar to other commercially sold gold recovery solutions) that uses an electrolysis method of extracting micron gold from high grade ore. See Declarations as evidence. Claimant sought approval for obtaining the chemicals, from the Drug Enforcement Administration, on two occassions prior to and during his purchasing of chemicals. See Exhibits A through F regarding claimants' complianne with regulations. See Exhibit G of other refining company selling strikingly similar gold recovery chemical solution using about the same ingredients.

9. One of the chemicals used in the gold recovery solution was a bio-degradable solution called hydriodic acid, which is also a chemical used in the manufacture of methamphetamine. However, claimant ordered his purchases of hydriodic acid to be mixed at the factory with hydrocloric acid, which would make the delivered product an undesirable chemical for drug manufacturing. Chemical company records verify the claimants compliance with the regulations, and that the chemical strength and and mixture of hydriodic acid was of such a level as to be undesireable for illegal drug business.

10. Thus, the plaintiff's claims that the chemicals ordered by claimant were for drug manufacturing is false, and such claim was uncorroborated by a single instance of such activity. The plaintiff has not produced one scintilla of evidence of drug manufacturing occurring from the claimant's chemical purchases. The plaintiff has only represented mere suspicion.

11. Claimants can account for the purchase and sales of all of the chemicals, by proper record keeping as required by law, which the plaintiff erroneously claims were used for illegal activity. All chemicals were purchased in compliance with the law, and sold to legitimate, verifiable mining operations using the electrolysis method of recovering micron gold.

Resp. App.
33 a

See exhibits A through N inclusive.

12. There is no mysterious or concealed sources of illegal money. All sources of income are documented and verifiable, as the proceeds of the claimants' gold mining operations and sales of the gold recovery solutions. See exhibits G through N. Additionally, the plaintiff has possesssion of other receipts to verify sales.

13. Claimants and the defendants properties all have a paper trail to legitimate sources of income. There is no unexplained sources of income, nor unexplained bank deposits, nor unexplained purchases.

14. No assets were ever concealed at any time.

15. All defendant properties have a verifiable legitimate source.

16. Currency Transaction Reports were always filed by claimants when required by law.

17. There is no corroborated evidence, nor even a scintilla of evidence of drug activity connected to the defendant properties.

18. Claimants' accountant was notified about the purchases of all vehicles and equipment for the purpose of compliance with tax laws.

19. When claimants purchased the defendant airplane, helicopter, and vehicles at auction, the claimants notified the seller to file all the proper IRS forms for a cash transaction because the claimants would be listing the purchases in their tax filings.

20. There is no concealment of the fact of who controlled or owned any of the defendant properties at any time whatsoever.

Resp. App. 34 a

CLAIMANTS' STATEMENT OF CONCLUSIONS OF LAW

IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGEMENT

A. PALINTIFF HAS NOT ESTABLISHED PROBABLE CAUSE WHEN CLAIM IS BASED WHOLLY UPON MERE SUSPICION, AND WITHOUT ANY CORROBORATION

Summary judgement is appropriate only where "there is no genuine issue as to material fact. . .the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgement, "the district judges function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Sorosky v Burroughs Corp., 826 F2d 794, 798 (9th Cir 1987).

Summary judgement is precluded if there is a dispute "over facts that might effect the outcome of the suit under the governing law." Anderson v Liberty Lobby, Inc. 477 U.S. 242, 248 (1986).

In the instant case, the claimants' evidence, sworn declarations, and attachments thereto, clearly show that there are disputed facts in plaintiff's "material facts". A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The plaintiff has no facts to support a finding of probable cause because it relies on its own employee's speclation and creative writing of an affidavit based on mere suspicions. The claimant's declarations and oppositions answers are sufficient to preclude summary judgement for the plaintiff, and to grant claiments' cross-motion, for lack of probable cause.

1. THE DEFENDENT PROPERTIES ARE NOT FORFEITABLE AS "NARCOTIC PROCEEDS THEORY" UNDER TITLE 21 U.S.C.§ 881(A)(6).

This circuit's determination of the existence of probable cause for forfeiture, in United States v $5,644,540.00 In U.S. Currency, 799 F2d 1357, 1363, (9th Cir 1986), is by application of the "aggregate of facts" test.

Resp. App. 35 a

Probable cause cannot be shown by plaintiff unless the "aggregate of facts" gives rise to more than mere suspicion that the property was exchanged for or intented to be exchanged for drugs; the presence or absence of any single fact is not dispositive. Id. Circumstantial evidence of drug transactions may support the establishment of probable cause. United States v $93,685.61, 730 F2d 571 (9th Cir) (per curiam), cert. denied. 469 U.S. 831, 105 S. ct. 119, 83 L. Ed 2d 61 (1984). The mere fact that a large amount of money is present in the case is not dispositive that the money was furnished or intended to be furnished in return for drugs. Id. However, the test requires more than the mere existence of a large amount of cash to establish a connection between that cash and illegal drug transactions; the money must be "in combination with other persuasive circumstantial evidence" Id. Particularly persuasive is the presence of drugs or drug paraphernalia. Id. see, United States v Padilla, 888 F2d 642, 643-644 (9th Cir 1989).

In this instant case, there is a conspicuous absence of any drugs or drug paraphernalia in all the searches of claimant's homes and businesses. Additionally, the money was in a bank, not sitting in a drug dealer's safe. Currency Transaction Reports had been filed. None of the properties were alleged to carry drugs. There is no question that claimant Arlt was successful at his gold mining operations and his sales of gold recovery solution for electrolysis operations. Some of the property, the $ 123,000.00 and the 138 silver bars, were in the security safe of Mayhill Bail Bonds, and no evidence of drug dealing activity was ever connected to this money or the long established Mayhill Bail Bond business.

In the instant case there is no evasive conduct as occurred in U.S. v $83,310.78 851 F2d 1231 (9th Cir 1988). In the instant case, the claimants came to the authorities to first report the attempted extortion of claimants by the San Bernardino Drug Task Force. Then, the claimants and their lawyer,

Resp. App. 36 a

John Barnett, volunteered to turn themselves in if there was any need. At all times, the claimants have been forthcoming and not evasive. At all times the claimants filed reports and left paper trails in compliance with law. At no time did any person testify that all defendant property was proceeds from any illegal activity, or used to facilitate illegal activity. See declarations of the claimants.

2) ALTHOUGH PLAINTIFF HAS NOT YET SHOWN MORE THAN MERE SUSPICION, CLAIMANTS HAVE PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT PROPERTIES ARE NOT THE PROCEEDS FROM ANY DRUG ACTIVITIES.

Plaintiff's only "evidence" is another government employee's affidavit of suspicions and opinions. The self-serving declaration of Special Agent Phillip Mullins ("SA Mullins") is nothing more than creative writing about suspicions and opinions woven together to support predetermined conclusions. There is no substance, only suspicion.

Plaintiff AUSA also included the indictment, an accusation, as evidence for this forfeiture. That the indictment is not evidence is common knowledge, and it should not be considered as "evidence" here.

Plaintiff uses the unjust conviction as if it is evidence that the defendant properties therefore, ipso facto, are guilty. Such reasoning is faulty, and probable cause does not lie here. Claimants did not plead guilty because they are not guilty. The conviction was obtained illegally and by the sheer financial superiority, and power to incarcerate, of the plaintiff, and not based on justice. The plaintiff produced 125 "witnesses" at the criminal trial, but not one could connect the defendant properties to illegal drug activities. The jury was so confused that it told the trial judge they were confused. Therefore, the judgement and commitment papers used by plaintiff as exhibits do not create probable cause.

Resp. App. 37 a

B. DEFENDANT PROPERTIES HAVE NOT BEEN SHOWN TO BE CONNECTED TO ANY MONEY LAUNDERING ACTIVITIES AND THUS ARE NOT FORFEITABLE

The plaintiff has also alleged that the defendant properties are forfeitable under Title 18 U.S.C. § 981(a)(1). However, plaintiff has not shown more than mere suspicion for his uncorroborated claims to confiscate the defendant properties.

To obtain civil forfeiture of property under the money laundering theory of Title 18 U.S.C. § 981 or the "narcotic proceeds" theory under Title 21 U.S.C. § 881(a)(6), the government need only show that probable cause exists to believe that the property was subject to forfeiture. There is clearly not enough evidence to show any connection between the defendant properties and illegal activities subject to §§ 981 and 881. The requirement is the same for either statute.

As stated above, the "aggragate of facts" does not show probable cause. At best, there is barely mere suspicion which the plaintiff cannot corroborate.

Assuming, arguendo, that the plaintiff had shown probable cause that the defendant properties qualified for forfeiture, the burden would then have shifted to the party defending the property to show by a preponderance of evidence that forfeiture is not appropriate. Claimants' declarations and the attached exhibits of evidence, A through AB inclusive, go far beyond the preponderance of evidence standard and become clear and convincing evidence that summary judgement should be granted for the claimants on cross-motion for summary judgement.

The plaintiff has not shown that the "essential elements" of Title 18 U.S.C. § 1956(a)(1) as he claims in order to activate forfeiture under Title 18 U.S.C. § 981. (See Plaintiff's Motion for Summary Judgement, page 18 ¶ a. The Statutory Framework.) Claimant, and defendant properties, did

Resp. App.
38 a

not behave in any manner consistent with the requirements of § 1956. For instance, the claimants filed currency transaction reports for all the transactions where required. The claimants never concealed nor disguised the ownership of the defendant properties. Every cash deposit, sale, or purchase of equipment or vehicles was completely visable, aboveboard, and with a complete paper trail. It is conspicuously clear that the claimants acted in a completely opposite manner from the essential elements of § 1956. All law enforcement attempts to forfeit properties claim that either the properties were purchased in a manner to disguise or conceal ownership, or that money was not reported on the proper IRS 1099's or Currency Transaction Reports. Here, in the instant case, the claimants have openly filed every required form for Currency Transactions, or for equipment or vehicle purchases, or for cash sales, and for the registration and ownership of every vehicle purchased. (See declarations of claimants, and document exhibits A through AB.)

In summation, every defendant property listed herein has a full and proper legal paper trail, in complete compliance with what the law required. There is not a single instance that the plaintiff can provide where § 1956 elements are met in order to activate forfeiture under § 981. A review of exhibits A through O shows the legitimate source of money, and purchase and resale of chemicals for gold recovery mining. The plaintiff has every Currency Transaction Report and 1099 form filed by claimants, and has not yet complied with another court's order to deliver those evidence receipts to the claimants.

C. THE PLAINTIFF HAS NOT PRESENTED ANY EVIDENCE OF ILLEGAL ACTIVITY CONNECTED WITH THE DEFENDANT PROPERTIES

The plaintiff claims that his use of a field agent's affidavit of suspicions, couched in creative and accusatory writing, without any specific

Resp. App. 39 a

illegal transaction identified, nor even a second hand report of a specific illegal transaction, is sufficient "evidence" to establish probable cause. See plaintiff's Motion for Summary Judgement, page 14 ¶b, footnote 2.

Although declarations are considered as evidence, it is usual that the declaration is by a witness to the illegal act, not by someone who saw nothing and heard of no illegal act. Here, the declaration of Special Agent Mullins is no more than creative, pro-government suspicion. There is no witness declaration. SA Mullins cannot even report that any other heresay witness told him that the defendant properties were used in, or involved in, or proceeds from, or used to facilitate, any illegal act whatsoever.

SA Mullins' declaration merely puts a twist on his interviews with people who sold various items to the claimants. No witness claimed anything illegal happened, nor that claimants failed to file a currency transaction report, nor that claimants attempted to conceal or disguise any transaction in any way.

Sa Mullins declaration is not even heresay, and it is not evidence. It is mere suspicion without a crime. The plaintiff relies heavily on United States v All Monies ($477,048.62) in account 90-2617-3, 754 F. Supp. 1467 (D. Hawaii 1991). There the government relied on several affidavits of agents who investigated the case. There was significant heresay used. Heresay evidence is not admissable to establish or rebut a claimant's innocent owner defense. Id. In All Monies, the claimant admitted that the government had probable cause to show money laundering activity, and there were direct money transfers to the accounts of the Medellin Cartel.

None of the All Monies facts are relevant in the instant case. Claimants have always maintained their innocense, and there is no illegal transaction with any of the defendant properties. The properties cannot be

Resp. App. 40 a

traced to any illegal activity as in All Monies. "To be forfeitable, there must be a substantial connection between the property and the illegal activity." Id at 1473. "There must be more than an incidental or fortuitous connection between the property and the illegal activity..." Id.

In the instant forfeiture, there is no portion of the defendant property used to facilitate any illegal act, and plaintiff cannot point to any specific illegal act. Claimants vigorously object to the plaintiff's conclusions which have failed to meet the "aggragate of facts" test required in this case. All of the plaintiff's points and authorities had one thing in common that is lacking in the instant case, and that is an illegal activity that someone witnessed which was connected to the properties.

D. THE THREE BANK ACCOUNTS WERE NEVER SHOWN, BY MORE THAN MERE SUSPICION, TO HAVE FACILITATED MONEY LAUNDERING, AND ARE THEREFORE NOT FORFEITABLE

The plaintiff relied heavily on vague and ambiguous claims of narcotic proceeds from unknown sources. This mistaken claim could be made of any account in any bank if the government was to ignore th proper paper trail.

The plaintiff relied on All Monies, supra, to make the uncorroborated claim that the bank accounts are forfeitable under a "facilitating" theory. The reasoning in All Monies was based on the fact that direct links were established to illegal activity, and the claimant conceded that the account was partially used to transfer illegal dollars. That is not the case here. In the instant case, the plaintiff cannot trace any deposit in the three bank accounts to any illegal transaction, and no claimant or witness has ever stated that either of the three bank accounts were ever used for any illegal deposits or for any illegal activity. The facts in this case require summary judgement for the claimants.

Resp. App. 41 a

In order for the plaintiff to prevail on a claim to forfeit the entire bank accounts as it claims, there would have to be some showing that the "account(s)" had commited some illegal act since it is a mere repository of funds. The plaintiff has not set forth a theory that some of the money in the bank accounts was legal and used to conceal the "illegal" proceeds. Indeed, the plaintiff has not identified which proceeds, or amounts, it believes are illegal and which are legal. The claimants evidence attached here does establish the legal source of the funds in the bank accounts.

Thus, the government cannot support "facilitation" theory of forfeiture under 18 U.S.C. § 981. See, United States v All Monies ($477048.62) In Account No 90-3617-3, 754 F. Supp.1467, 1472 (D. Hawaii 1991)

E. DEFENDANT CURRENCY AND 138 SILVER BARS HAVE A LEGITIMATE SOURCE AND ARE THEREFORE NOT FORFEITABLE UNDER PLAINTIFF'S THEORIES

Plaintiff cites several cases that have held that under certain conditions the possession of large amounts of currency is strong evidence of drug trafficking. However, the distinguishing point between the plaintiff's cited authorities and the defendant properties herein is the lack of a nexus or direct link to drug activity, or concealment, or unusual behavior, or there is an amount of money far beyond the ways and means of the claimant. There is always some fact of illegal drug trade or behavior that normal people would not customarily do in the handling of their affairs. See plaintiff's citations: United States v $5,644 in U.S . Currency 799 F2d 1356, 1362 (9th Cir 1986); United States v $29,959 U.S. Currency, 931 F2d 549, 553 (9th Cir 1991); United States v Thomas, 913 F2d 1111, 1115 (4th Cir 1990). Without exception, the plaintiff cites cases that uphold the forfeiture of money only when there is other direct evidence of drug offenses, unusual concealment, or a defendant has claimed money that is far beyond his declared income and believable and verifiable means and living standards.

Resp. App. 42a

For the very reasoning in plaintiff's citations, the large amount of money in this case is not subject to forfeiture. There is not a single drug transaction involving the claimants or the defendants, but for the conclusory and uncorroborated claims of plaintiff. There are no witnesses telling the plaintiff that the claimants admitted using the defendant properties or the sums of money for illegal activities, or that the defendants were proceeds from illegal activity. There are only suspicions and conclusions. The defendant money in the bank accounts, and other defendants, was not concealed or disguised in any false names. Claimants were completely aboveboard in all their banking because there was nothing illegal going on. Claimants did have valid and verifiable sources of income from their businesses. The defendant properties and money can be reasonably seen to have been generated by the claimants businesses.

Additionally, claimants here, as opposed to the claimants in the plaintiff's citations, have left a complete paper trail of the required Currency Transaction Reports and IRS 1099 forms for every transaction requiring such a form. The business operations of the claimants was the source of every cent used by claimants in their banking and purchase of additional equipment and chemicals for resale.

Plaintiff repeatedly concludes that the defendant properties and money were proceeds from methamphetamine business, and that the bank accounts were used to "facilitate" numerous money laundering acts. Nowhere does plaintiff directly connect one penny to any methamphetamine. Nowhere, except by suspicion and conclusion, does plaintiff identify the dates and individuals in any actual drug deal. All of claimant Arlt's chemicals purchased, and subsequent sales of the mixed gold recovery solution to legitimate mining operations, are accounted for. There was no drugs, no drug lab, or even drug paraphernalia present at any location of defendants or claimants.

Resp. App. 43 a

CONCLUSION RE: MOTION FOR SUMMARY JUDGEMENT

Plaintiff should be denied summary judgement. The government has not met its "initial responsibility" of demonstrating the absence of a genuine issue of material fact--that is, if taking all the evidence in the light most favorable to the claimant , the government has not shown that no reasonable jury could award the property to the claimant. See Celotex Corp. v Catrett, 477 U.S. 316, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265(1986) When the record now before this court is viewed in a light most favorable to the claimants, there remains genuine issues of material fact concerning, inter alia, whether any "narcotic proceeds" or other illegal activity was the source of the funds and the defendant properties, whether any claimant practiced concealment or disguise of the ownership and control of the properties, whether the claimants failed to file currency transaction reports or IRS 1099 forms for every cash deposit and purchase, and whether any money was laundered at all in light of the claimants evidence and exhibits proving sales of gold and gold recovery solution to legitimate mining customers whom the government has not been able to impeach. See United States v Lot 4, Block S of Eaton Acres, 904 F2d 487 (9th Cir 1990)(Affidavit precludes judgement).

The government has not produced any testimonial evidence that any person heard any claimant ever say that they were investing "drug proceeds" into the purchase of the defendant properties, and into the bank accounts listed herein by the government. All of the persons interviewed by SA Mullins whose affidavit of second hand heresay and opinion is submitted as the government's only evidence, stated that the claimants never discussed any business other than their legitimate gold mining and recovery business or Towing business. Not one person ever stated to IRS SA Mullins that they ever witnessed or heard anything suspicious about the business operations. For this reason, the facts of this case do not entitle plaintiff to judgement.

Resp. App. 44 a

CONCLUSION RE: CROSS-MOTION FOR SUMMARY JUDGMENT

The government has not shown a substantial connection to exist between the defendant properties and either of its theories of "narcotics proceeds" nor "money laundering" when there is not a scintilla of evidence under either theory that will rebut or counter the claimants evidence and exhibits attached hereto, and the paper trail of currency transaction reports and IRS 1099 forms filed by claimants for the properties.

The claimants have not only met any burden, assuming probable cause had existed beyond mere suspicion, but also claimants have affirmatively produced evidence to demonstrate the legitimate source of all the defendant properties .

Clearly, the abundant paper trail in the instant case contradicts the profile for properties purchased with "narcotics proceeds" or properties used in "money laundering" and other typical asset concealing operations.

The government has seized and continues to hold the defendant properties upon conclusory allegations that the defendant properties are forfeitable.

The claimants Arlt's and Wren's Declarations are attached as evidence in support of their claims, in opposition to plaintiff's motion, and in support of claimant's cross-motion. Attached to the declaration of claimant Arlt are documentary exhibits A through AB.

Exhibits A,B, and D are letters between claimants' business associates and Calabrian Chemical Corporation showing the purpose of the chemicals purchased and discussing the method of complying with all required regulations.

Exhibit C is a letter to the Drug Enforcement Administration from claimants' business associates to insure compliance with laws, and to reveal the legitimate application of the chemical purchases of hydriodic acid. Exhibits C1 and C2 are correspondence from claimants company to D.E.A. about the solution

Resp. App. 45 a

Exhibits E and F are the telephone notes by the D.E.A. agent regarding the purchases by AAA Minerals Company of hydriodic acid from Calabrian Chemical Corporation for the express purpose of leaching gold in solution using electrolysis. The chemical solution mixed at Calabrian for Arlt, and reported properly to the D.E.A. for approval, contained 48% hydriodic acid, 4% hydrocloric acid, and 3% hydrophosphorous acid. The claimants kept all records of the chemical transactions, as required. The D.E.A. was aware or notified of all the chemical purchases where required, the purpose, and the destination. (When the chemicals arrived at Arlt's warehouse, the solution was diluted an additional 18% when the chemical "thiourea" was added. This made the solution undesirable for drug production, but ideal for gold leaching.)

Exhibit G is an advertisement of a competitor company, Bahamian Refining Services, which used nearly identical formulae, and has done so for nearly 20 years. This chemical process is about 50 years old. The owner of Bahamian Refining Services, Mr. Fred Finnel, has discussed this chemical process with the trial prosecutor. Mr. Finnel would testify as a witness for the claimants. There is no question as to the legitimacy of this chemical gold leaching process and claimants' business.

Exhibits H-1 through H-12 are the chemical purchase orders and receipts from AAA Mineral Company to Calabrian Corporation showing the paper trail of chemical purchases for the mining operations and sales.

Exhibits I through O inclusive are the sales receipts from claimant Arlt to numerous gold solution customers in the mining business, all cash sales are documented. All customers are legitimate mining operations.

Exhibits P through V are the reports of police interviews from claimant Wren, his wife Regina, and several other witnesses to the attempted extortion of claimants by member(s) of the San Bernadino Drug Task Force. This was the basis of the criminal and forfeiture cases against claimants,

Resp. App.
46 a

and the death of Regina Wren.

Exhibits W through AA are interviews that the police took from the people around Captain Butterfield the night he tried to extort money from claimant Wren, preceeding the arrest of the claimants.

Exhibit AB is a police report of claimants' attorney John Barnett revealing the extortion attempt to the District Attorney for the Drug Task Force, and the claimants offer to cooperate in any way.

Exhibit AC is the December 26, 1990 police interview with claimant James Wren concerning an investigation of a suspect named Ronald Dewbre who had left several vehicles at Highland Towing Company's storage yard. Wren was cooperative and invited police to come to inspect Highland Towing at any time they liked for the company was completely legitimate.

Claimants evidence shows that there are no essential elements, or probable cause, for forfeiture of the defendant properties under either of the government theories.

The government han only offered conclusions upon its suspicions.

The conspicuous absence of any direct connection to narcotics or to illegal activity, when combined with the strong evidence of legitimate sources of the proceeds in the defendant properties, shows that the claimants are entitled to judgement based on the facts, and as a matter of law.

Dated:

Respectfully submitted,

CHARLES WESLEY ARLT
26889-048
U.S. Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

Claimant in Pro Se

Resp. App.
47 a

APPENDIX C

Charles Wesley Arlt
25889-048
U.S. Penitentiary
3901 Klein Boulevard
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Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs $405,089.23 IN U.S. CURRENCY, et al., Defendants, CHARLES WESLEY ARLT, JAMES ELI WREN, and PAYBACK MINES, Claimants.	Case No. CV-91-3264 AET(EEx) CLAIMANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, IN SUPPORT OF CLAIMANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Claimants Arlt and Wren, incarcerated and in pro se, hereby submit the following claimants' statement of uncontroverted material facts and conclusions of law pursuant to Central District of California Local Rule 7.14.1. These include every essential element to show claimants' entitlement to a judgment as a matter of law. Claimants' opposition to the plaintiff's motion for summary judgment, and claimants' correction of the plaintiff's erroneous and misleading statement of facts, shows that all of the defendant properties have a legitimate source, an abundant legitimate paper trail, and full compliance with all IRS forms 1099 and all currency transaction report. All references herein in this statement are to those exhibits supporting

Resp. App. 48 a

claimants' declarations, cross-motion for summary judgment, and memorandum of points and authorities.

CLAIMANTS' STATEMENT OF UNCONTROVERTED FACTS

1. This in rem forfeiture action was brought against the defendant properties pursuant to a claim by the plaintiff under Title 21 U.S.C. § 881 (a)(6) and Title 18 U.S.C. § 981. Specically, the plaintiff has limited his theory for forfieture to two theories; first, that the defendant properties are forfeitable because the government claims they represent items traceable to illegal narcotics activities in violation of 21 U.S.C § 881(a)(6); and, second, because the government claims the defendants were involved in "financial transactions in violation of 18 U.S.C. §§ 981 and 1956."

2. Claims have been filed in this action by claimants Charles Arlt ("Arlt") and James Wren ("Wren") and Payback Mines. Declarations by claimants Arlt and Wren are submitted herein as evidence, and attached hereto in support of this document.

3. In every single transaction by claimants', or their employees, in which cash, cashier's checks, or money transfers occurred, there was a properly completed and filed Currency Transaction Report, or bank remittance or bank acceptance form, or IRS 1099 form, submitted to the proper authority. The plaintiff knows this fact to be true in every financial transaction, including the wire transfer of funds for the purchase of chemicals for Claimant's gold recovery solution business. There was never any concealment of names of claimant or the source of the funds, or the use of the chemicals purchased.

4. Because of the undeniable fact that a currency transaction report was properly and timely filed in all transactions by claimants in relation to the defendant properties, there is no violation of 18 U.S.C.

Resp. App. 49 a

§ 1956 which plaintiff uses to claim forfeiture under § 981. Failure to file currency transaction reports is viewed as a required element under § 1956, and such behavior is not present here.

5. The claimants have unquestionably never attempted "to conceal or disguise the nature, location, source, ownership or control of..." defendant properties, nor the source and use of those properties. The plaintiff has possession of all sales receipts, purchase orders, purchase receipts, vehicle and equipment registrations, and the related banking form or IRS 1099 form or currency transaction form for every defendant property where required by law and there is no trace of concealment or disguise of ownership. Claimants' have at all times left a wide paper trail like any other legitimate business person(s) would do.

6. Because there was no attempt to "conceal of disguise the nature, location, source, ownership or control of..." the defendant properties, and because prior to arrest the claimants had willing invited the police to inspect their businesses, there is no violation of 18 U.S.C. § 1956 which plaintiff uses to claim forfeiture under § 981. Concealment and disguise of the nature, location, source, ownership or control of the defendant properties is an essential and required element under § 1956, and such behavior is conspicuously absent here.

7. No drugs or drug paraphernalia was present at any of the claimants' homes or businesses, and none of the defendant properties were found in connection with use or presence of drugs or drug paraphernalia. In fact there are no drugs found in the presence of any claimant, nor was there any witness ever to claim that the defendant properties were the proceeds from any drug business. The only "witnesses" that the plaintiff can ever produce is a government agent with suspicions and conclusions. There is not even circumstantial evidence.

Resp. App. 50 a

8. Claimant Arlt has been in the gold mining business for over twenty (20) years which is verifiable and undisputed by plaintiff. Claimant Arlt had developed a gold recovery chemical solution (similar to other commercially sold gold recovery solutions) that used an electolysis method of extracting micron gold from high grade ore. See Declarations as evidence. Claimant sought approval for obtaining the chemicals, from the Drug Enforcement Administration, on two occassions prior and during his purchasing of chemicals. See Exhibits A through F regarding claimants' compliance with regulations. See Exhibit G of other gold company selling the similar gold recovery chemical solution using about the same ingredients.

9. One of the chemicals used in the gold recovery solution was a bio-degradable solution called hydriotic acid, which is also a chemical used in manufacturing of methamphetamine. However, claimant ordered his purchases of hydriotic acid to be mixed at the factory with hydrocloric acid, which would make the delivered product an undesirable chemical for drug manufacturing. Chemical company records verify the claimants' compliance with the regulations, and that the chemical strength and mixture of hydriotic acid was of such a level as to be undesirable for drug business.

10. Thus, the plaintiff's claim that the chemicals ordered by claimant were for drug manufacturing is false, and such claim was uncorroborated by a single instance of such activity. The plaintiff has not produced one sintilla of drug manufacturing occurring from the claimants's chemical purchases. The plaintiff has only presented mere suspicion.

11. Claimants can account for the purchase and sales of all of the chemicals, by proper record keeping as required by law, which the plaintiff erroneously claims were used for illegal activity. All chemicals were purchased in compliance with law, and sold to legitimate, verifiable mining operations using the electrolysis method of recovering micron gold.

Resp. App.
51 a

See Exhibits A thorough N inclusive.

12. There is no mysterious or concealed sources of illegal money. All sources of income are documented and verifiable, as the proceeds of the claimants' gold mining operations and sales of the gold recovery solutions. See Exhibits G through N. Additionally, the plaintiff has possession of other receipts to verify sales.

13. Claimants and the defendant properties all have a paper trail to legitmate sources of income. There is no unexplained sources of income, nor unexplained bank deposits, nor unexplained purchases.

14. No assets were concealed.

15. All defendant properties have a verifiable legitimate source.

16. Currency Transaction Reports were always filed by claimants when required by law.

17. There is no corroborated evidence, nor even a scintilla of evidence of drug activity connected to the defendant properties.

18. Claimants' accountant was notified about the purchases of all vehicles and equipment for the purpose of compliance with tax laws.

19. When claimants purchased the defendant airplane, helicopter, and vehicles at auction, the claimants notified the sellor to file all proper IRS forms for a cash transaction because the claimants would be listing the purchases in their business tax filings.

20. There is no concealment of the fact of who controlled or owned any of the defendant properties.

Resp. App. 52 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CASE NO. CV 91-3264-AWT (EEx)

CLAIMANT'S OPPOSITION AND CORRECTION TO PLAINTIFF'S ERRONEOUS STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, AND,

CROSS-MOTION FOR SUMMARY JUDGEMENT

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988) upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

ORIGINAL AND ONE COPY TO: UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 North Spring Street
Los Angeles, California
90012

ONE COPY TO: UNITED STATES ATTORNEY'S OFFICE
312 North Spring Street
Los Angeles, California
90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 26th day of January 1993

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436
Claimant in Pro Se

Resp. App.
51 a

James Eli Wren
96377-012
U.S. Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23, et al., Defendants, Charles Wesley Arlt, James Eli Wren, and Payback Mines, Claimants.	DECLARATION OF CLAIMANT JAMES ELI WREN IN SUPPORT OF NOTICE OF JOINDER Etc., and MOTION TO JOIN ALL SUBMISSIONS BY CLAIMANT CHARLES WESLEY ARLT

I, JAMES ELI WREN, declare:

I am the claimant in the above entitled and numbered action. I am presently incarcerated at the United States Penitentiary at 3901 Klein Boulevard, Lompoc, California 93436. I am not a trained lawyer, and I need this Honorable Court's protection of my rights in this action.

In the interest of judicial economy and fairness, I wish to join, and adopt as my own, all submissions, pleadings, motions, and responses, by Pro Se claimant Charles Wesley Arlt.

I am capable of acting on my own behalf. However, I am not trained as a lawyer. I need the Court's protection of my fundamental rights to due process and fairness in this matter.

Resp. App.
54 a

James Eli Wren
96377-012
U.S. Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405, 089.23, et al., Defendants, Charles Arlt, James Wren, and Payback Mines, Claimants.	Case No. CV 91-3264-AWT (EEx) NOTICE OF JOINDER BY CLAIMANT JAMES ELI WREN, AS HIMSELF, AND DOING BUSINESS AS CLAIMANT "PAYBACK MINES", AND AS VICE-PRESIDENT, AGENT OF SERVICE FOR CLAIMANT "PAYBACK MINES"; AND MOTION TO JOIN ALL SUBMISSIONS BY CLAIMANT CHARLES WESLEY ARLT

Claimant, JAMES ELI WREN, as himself, and doing business as (DBA) claimant PAYBACK MINES, and as vice-president and agent of service for claimant PAYBACK MINES, hereby gives notice of joinder, and moves to join, and adopt as his (their) own, all submissions, pleadings, motions, and responses, by Pro Se claimant Charles Wesley Arlt, from this time forward, without exceptions.

Dated: January 26, 1993

Respectfully submitted,

JAMES ELI WREN
96377-012
Lompoc, California

I am the vice-president and agent of service for PAYBACK MINES INC., a Nevada Corporation. I am legally the correct person to act on behalf of claimant PAYBACK MINES.

I am submitting this notice of joinder, motion to join, and declaration in support, in good faith and not for any dilatory reason.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 26, 1993.

JAMES ELI WREN
Claimant in Pro Se as
himself, and as vice-president
and agent of service for
claimant "PAYBACK MINES"

CERTIFICATE OF SERVICE

I, JAMES ELI WREN hereby certify that I have served a true and correct copy of the foregoing

NOTICE OF JOINDER
MOTION TO JOIN
DECLARATION IN SUPPORT OF

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

ORIGINAL AND ONE COPY: UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 North Spring Street
Los Angeles, California 90012

ONE COPY TO : UNITED STATES ATTORNEYS OFFICE
312 North Spring Street
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 26th day of January 1993

JAMES ELI WREN
96377-012
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
57 a

APPENDIX D

CHARLES WESLEY ARLT
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3901 Kline Boulevard
Lompoc, California 93436

Claimant in Pro Se

FILED
MAR 23 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23 U.S. CURRENCY; et al., Defendent and CHARLES WESLEY ARLT, JAMES WREN, PAYBACK MINES Claimant.	No. CV 91-3264 AWT(EEx) CLAIMANT'S MOTION TO STRIKE ERRONEOUS PORTIONS OF "PLAINTIFF'S REPLY TO CLAIMANTS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT: MEMORANDUM OF POINTS AND AUTHORITIES."

Incarcerated claimants in pro se move to strike certain inaccurate and erroneous portions of the "Plantiff's reply to claimants' opposition to motion for summary judgement: Memorandum of points and authorities"

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF FACTUAL ERRORS

The plaintiff has misstated at 3:12 that "Possession of such an extremely large amount of cash is highly consistent with someone involved in narcotics, according to numerous Ninth Circuit cases." Every Ninth Circuit case concluding that cash was

Resp. App. 58 a

consistent with narcotics activity included a definite factual finding that presence of cash must be "in combination with other persuasive circumstantial evidence" particularly the presence of drugs or drug paraphernalia. Thus the plaintiff is mistaken that the mere presence of a large amount of cash is dispositive of narcotics activity. In this case, drugs and drug paraphernalia are conspicuously absent from the criminal case and in every purchase or use of the defendant properties.

The plaintiff is mistaken at page 3:15-21 that claimiants' questionable jury convictions alone are enough to establish probable cause. The prosecutor uses cases of "guilty pleas" convictions where the defendents had admitted that the forfeiture property was directly connected or used in drug activity or was the proceeds for drug business. However there is no reported cases that claimant could find where a "jury trial conviction" was an automatic probable cause for forfeiture unless the defendant or other witness testimony directly linked the forfeiture property to proceeds from drug activity or the property was used to facilitate the drug transaction. Similarly, there are no reported cases of of forfiture of property under a money laundering theory unless there was direct evidence that the property was used to facilitate, or was proceeds from money laundering activity. In the instant case, the plaintiff has absolutely no evidence of any drug tranaction anywhere.

At 4:11 to 4:18 the prosecutor plaintiff is mistaken when he claims that the claimants have not provided specific facts on which a "reasonable fact finder could conclude that the defendant properties were not the proceeds" of the vague and fabricated

Resp. App. 59 a

illegal drug activity presented by the prosecution. The prosecutor filed for summary judgment yet he has completely failed to reveal a single instance of a drug sale, a drug possession, a drug lab, a drug buy, a drug "cook", or even a single witness to any actual drug deal. Nowhere is there an actual drug crime except for the amazing conviction based only on government shining-star-police-witness-expert-speculators. There was not a scintilla of real evidence of any illegal activity in this underlying conviction now in the court of appeals. The jury admitted confusion. Claimants have specifically pointed to these above facts that there was no drug business, and they cannot be estopped from the truthful claim that all the defendents were innocent of the charges.

Thus, the claimants affidavits,sworn under the penalty of perjury, are competent declarations by the most knowledgable parties to this action, and the affidavits must be accepted as true and they create a material issue of fact. The defendant's affidavit in United States v. Lot 4, Block 5 of Eaton Acres, 904 F2d 487 (9th Cir 1990) precluded summary judgment. The same priciple is applicable here to preclude summary judgment.

At page 5:6 to 6:7 the plaintiff is mistaken about his theory of estoppel. The claimants' erroneous conviction does not estop them from arguing the truth that they were in the gold mining business, and not an illegal business. There was no finding that the claimant's gold mining operation was not valid. Charges that the defendants were nothing more than drug dealers is a theory concocted by the zealous government agents operating outside the law.

Resp. App. 60 a

The claimants can find no case law that prevents the telling of truth.

Moreover the prosecutor has used the wrong legal precedent in his "three-step" estoppel claim using a state court case. The correct precedent to apply here is United States v. Real Property located at Section 18, 976 F2d 515, 518 (9th Cir 1992) which sets forth a four-step criteria for the application of collateral estopple.

Again the case is based on a "guilty plea". Howerer, this Circuit has ruled that the issue "estopped" must have been conclusively decided at the prior criminal proceedings. In the instant case, none of the defendant properties were proven to have been purchased by claimants with drug money laundering proceeds, nor were any of the defendant forfeiture properties proven to have been used to facilitate or conceal drug transactions, drug proceeds, or money laundering activities. Thus, claimants are not bound by the prosecutor's misunderstanding of estopple in this case. The issues about the defendant properties were never given full and fair litigation opportunity, thus there is no estopple.

At page 6:26, the plaintiff disparages the claimants' evidence provided in their sworn affidavits. Evidence to the contrary, the plaintiff contends that the claimants have "failed to offer tax returns or any tax related documents tending to establish that they reported legitimate income to the Internal Revenue Service." First, claimants are not required to provided their tax returns in this matter. Secondly, the plaintiff has in his possession all of claimant Arlt's tax records seized

Resp. App. 61a

either from the Certified Public Accountant who was preparing the tax returns, or seized from Arlt himself. Thus, it is improper for the plaintiff to infer that any tax returns are not presented when he knows that the tax returns were being prepared at the time of arrest, and that the government has seized those records. If plaintiff would produce the claimant's tax records and files in discovery, all income could be verified as being legitimate, and a tax return could be completed.

Indeed it is the government who has failed to ever produce a single drug customer, or single drug transaction, or a single drug lab, or a single instance of a true money laundering activity, or a single instance where the claimants ever concealed any asset, or failed to immediately file (or cause to be filed) all required currency transaction reports and IRS 1099 forms. The governments case is a naked assessment without any foundation in fact and is based soley on the misscarriage of justice in the underlying criminal case convictions which are now on appeal.

At page 7, the plaintiff claims shock that the claimants Arlt and Wren, and their five other witnesses, reported the extortion attempts by the police investigators in this case. The plaintiff cannot be so sheltered from the world of drug law enforcement that he does not realize the very high statistical lidelihood of narcotics police agents using extortion and taking money from drug dealers. The newspapers are full of these "crooked police" stories that the court may take judicial notice of because the same scenario is commonplace in both the state, county, city, and federal drug law enforcement business. In this

Resp. App. 62 a

case, the extortion attempt is well documented because the claimants Arlt and Wren, and the murdered main witness Regina Wren, and five others, reported this crime to an attorney and the local police. Unfortunately this strategy got Regina Wren, the main witness, killed by the same special drug task force which conducted the investigation. (There are other witnesses available to verify other extortions and drug sales by this same task force).

It is highly improbable that the plaintiff will clean up his own house. The investigation by the San Bernardino District Attorney's Officer of its own special drug task force was merely a sanatizing. It is highly improbable that the claimants would go to the police to report the crime, and volunteer to be available for the police, as well as notify the DEA of their chemical purchases in advance, if the claimants were actually conducting an illegal drug business.

At 7:6, the plaintiff's legal authorities are misapplied here: Johnson v Washington Metro. Area Transit Authority, 883 F2d 125, 128 (D.C. Cir. 1989) and Stitt v Willams 919 F2d 516 (9th Cir.1991). In those cases, the contentions of the declarant were contested by other witnesses. That is not the case here where both the claimants Arlt and Wren corroborate each other about the extortion, and there are five other supporting witnesses' affidavits without a single witness affidavit contesting or disputing the extortion attempt, or the legitimacy of the gold mining business.

At page 8:2 to 14, the plaintiff is mistaken on the law of this curcuit that hold that a claimant's sworn affidavit

Resp. App. 63 a

is sufficient to provide a material issue of fact to prevent summary judgment. In this case, there are two claimants' sworn affidavits that are evidence that no defendant property was ever purchased with drug proceeds or money laundering proceeds.

At page 8, footnote 2, the plaintiff mistates the recond in the criminal trial when he erroneously claims that the issue (of claimants'business of selling chemicals for gold mining) was previously litigated. There was no full and fair opportunity to litigate anything about the claimants' gold mining chemical sales business. The issue is not precluded because it was not litigated.

Plaintiff has no basis for this forfeiture other than the mere conviction. Claimants request a common sense approach to review of their exhibits, receipts, and sworn affidavits. The prisoner claimants are financially destroyed, in pro se, untrained in law, and denied access to their own records and files in this case which the plaintiff already has in his possession.

At page 8:16 to page 10, the plaintiff contends that the claimants' cross motion for summary judgment should be denied on a mere technicality scheduling. The plaintiff has been well aware of the fact that claimants' previous counsel from the Center for Constitutional Law are under investigation for abandonment of hundreds of clients, including the claimants. It appears very unfair for the prosecutor to take advantage of such a problem. There is ample excusable neglect and good cause for lateness of claimants' opposition and cross-motion for summary judgment.

Resp. App. 64 a

At page 9:5 to 9:23 the plaintiff lists eight contentions that he says are uncontroverted, yet he does not present the entire picture.

(1) Claimants were convicted of a vague conspiracy to manufacture methamphetamine in an unusal trial. Trial police witnesses admitted that no drugs nor required ephredrine were ever found and connected to the claimants' case. The conviction will likely be reversed on appeal for insufficiency of evidence. There are simply no drug lab or even precursor chemicals present or connected to claimants, or the properties, that are necessary to manufacture any drugs. There is not a scintilla of drug business evidence, not even a witness to testify to any illegal activity of anykind having to do with claimant Arlt's mining chemicals or his mining business.

(2) Claimants were convicted for conspiracy to launder monetary instruments yet there is not a single insident of concealment of the funds legally derived from gold mining solution sales. There is not a scintilla of evidence of any money transaction that was not in complete compliance with law. Currency transaction reports and IRS form 1099s were scrupulously filed when necessary, and all other persons with whom the claimants conducted business were specifically told to report the cash transactions. The plaintiff is creating a new legal threshold for criminal activity called the "any cash equals a crime" standard. Not so long ago, men (and women) conducted business in cash as a normal practice. Now it appears to be a mark of criminal activity. There is no evidence of money laundering and these convictions will be reversed on appeal for insufficiency of evidence.

Resp. App. 65 a

(3) Claimants were indeed convicted of all counts by a very confused jury despite the lack of evidence. There were only police witness "experts" and no eyewitnesses to any drug activity or money laundering activity not even by police officers.

(4) Jim Rocky Hill was indeed convicted for "laundering the $405,089.23 that is the subject of this action" in a manner that is completely without any basis for the conviction. There is no evidence of money laundering, only a bald conviction that will be reversed on appeal as a matter of law and for insufficiency of evidence. Claimant Arlt readily admitted transferring his $405,089.23 to Hill's account in order to have the money on hand to pay to the IRS on Arlt's 1990 taxes. This intention was known to Hill, the C.P.A. preparing the taxes, Jim and Regina Wren. (It is inconceivable that anyone would be convicted of money laundering to the IRS, as occurred here).

(5) Payback Mines did not control the bank accounts with the $8,929.93 that is a subject of this action. It was Highland Towing Company that controlled the account, and there is no criminal activity in this account ever demonstrated.

(6) Claimants did indeed purchase the Piper Cherokee 6 airplane, Bell 47 heliocopter, Stormy Seas Four shrimp boat and eleven vehicles with cash and with all currency transaction reports, or IRS 1099 forms completed or in the alternative, the seller was notified by the claimants to file the appropriate form in compliance with law. Cash is still not illegal per se. Cash is a customary and normal medium of exchange in the precious metals business because the precious metal can be abscounded with on a bad check, and never be found. At this very same time the banking

Resp. App. 66 a

and savings and loan industry offices were closing their doors, being taken into receivership, and going out of business because the banks had lost the depositors' money. In the 1989-90 era, use of banks to handle your money was a risky decision. The cash used for the claimants' purchases was entirely legal and no suspicious behavior was present in any transaction. The ownership of the vehicles was not concealed.

(7) These cash purchases, totalling $253,700, did indeed occur within approximately a thirty-five day period from December 30, 1990 to February 1, 1991. This is an irrelevant fact and has no inherently illegal quality to it. Claimants had made their purchases in the beginning of the tax year 1991. All purchases would be vehicles and equipment used in business or trade to obtain profit. This is not illegal. Claimants' trial testimony indicated the fact that the use of cash in 1991 was based on the high rate of bank failures in this country at this time and that claimant Arlt did not trust banks. Many citizens do not trust banks.

(8) Wren did not deliver $123,000 to his sister's Bail Bond business and there is no record of this claim by the prosecutor. Arlt testified that there was actually $153,000 in cash, but that $30,000 disappeared as the police transported the money to the San Bernardino Sheriff's Department. (The same sheriff's department that is already accused of illegal drug activity and extortion) The trial evidence shows that the police took the money. Otherwise, there is nothing illegal about the claimants' keeping money in a vault at the Bail Bond office. No criminal activity is connected here.

At page 9:20 to 10:2 the plaintiff mischaracterizes the

Resp. App. 67 a

four case authorities by claiming "[t]he purchase of property with large amounts of cash and possession of 'an extremely large amount of cash'(a vague term without qualification here) is highly consistent with someone involved in narcotics, according to numerous Ninth Circuit cases."(citations omitted). Each of those citation specifically states that cash in the presence of other persuasive evidence, such as drugs or drug paraphernalia. There is no reported case, relying on were the presence of cash alone, without the presence of drugs of other paraphernalia. In the instant case, the prosecutor cannot point to any drug presence not even a scintilla worth, that is connected to the cash, the bank accounts, or any of the defendant properties. It was not proper for the plaintiff to mischaracterize the legal authority in this brief. United States v. Padilla, 888 F2d 642, 643-644 (9th Cir 1989) makes this issue very clear. The law of the circuit required more that "mere presence" of cash, and the miscarriage of justice convictions are not sufficient propable cause.

CONCLUSION

Contrary to the amazing claim by the plaintiff that the convictions alone establish problable cause to believe that each and every one of the defendant properties is forfeitable, there must have either been a full and fair litigation oppourtunity on the source of each property, or there must have been some drug activity or drug presence connected to each property. Neither condition is met by the facts in evidence. The claimant's convictions are incredible because there was never any drugs or even ephredine found in connection to the claimants mining solution business. There is ample evidence that the mining

Resp. App. 68 a

solution is a genuine commercial product that is nearly identical to the solutions sold by other precious metal refining companies. The actual existence of claimants' mining claims and gold sales confirms the legitmate nature of claimants' activities in connection to the defendant properties. During the criminal trial two agents of the Drug Enforcement Agency testified that they had investigated AAA minerals and the purchase of the hydriotic acid for the mining solution, and that they determined that the company was legitimate, and that the chemical purchases were for legitmate reasons.

Accordingly, the claimants respectfully request that the Court deny the plaintiff's motion for summary judgment, and that the Court grant the claimants' cross-motion for summary judgment.

DATED: MARCH 17, 1993.

Respectfully Submitted,

CHARLES WESLEY ARLT
26889-048
Claimant in Pro Se

JAMES ELI WREN
96377-012
Claimant in Pro Se

Resp. App. 69 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true correct copy of the foregoing

CLAIMANT'S MOTION TO STRIKE ERRONIOUS PORTIONS OF "PLAINTIFF'S REPLY TO CLAIMANTS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT: MEMORANDUM OF POINTS AND AUTHORITIES."

ich is deemed filed at the time it was delivered to prison thorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

on the defendant/defendants and/or his attorney/attorneys of record by placing he in a sealed, postage prepaid envelope addressed to:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA ---------- ORIGINAL AND ONE COPY
312 NO. SPRING STREET, G-8
LOS ANGELES, CALIF. 90012

U.S. ATTORNEY OFFICE
312 NO. SPRING STREET ---------- ONE COPY
LOS ANGELES, CALIFORNIA 90012

d deposited same in the United States mail at the U.S. Penitentiary, Lompoc, lifornia on this 17 day of MARCH 19 93

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
70 a

APPENDIX E

CHARLES WESLEY ARLT
26889-048
3901 Klein Boulevard
Lompoc, CA 93436

Claimant in Pro Se

FILED
APR 16 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs $405,089.23 in U.S. CURRENCY, et al., Defendant. and CHARLES WESLEY ARLT, JAMES ELI WREN, AND PAYBACK MINES, INC., Claimants.	Case No. CV 91-3264 AWT(EEx) CLAIMANTS' MOTION FOR RECONSIDERATION OF APRIL 1, 1993 ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF, PURSUANT TO LOCAL RULE 7.16 AND, STATEMENT OF GENUINE ISSUES

Claimant in pro se, Charles Wesley Arlt, incarcerated and joined by all other claimants to this action, hereby moves this court for reconsideration, pursuant to Local Rule 7.16, of the April 1, 1993 Order of this Court granting Summary Judgment to the plaintiff. The grounds for this motion are a) there were substantial genuine issues of material fact by the opposing party claimants that were not reviewed, supported by evidence, (L.R. 7.16(a)) and b) there was a manifest showing of a failure to consider material facts presented to the Court before such decision. (L.R. 7.16(c)).

This motion will not repeat any argument given review.

Resp. App. 71 a

BACKGROUND

The plaintiff moved for summary judgment of December 4, 1992, without service to the claimants. Claimants received service of the Motion for summary judgment on December 29, 1992.

Claimants Arlt,Wren, and Payback Mines, Inc., have joined to oppose the motion for summary judgment by filing opposition to the motion for summary judgment on January 29, 1993, which contained a statement of genuine issues of material facts that were clearly in dispute to the plaintiff's claims.

At the same time, the claimants filed their cross-motion for summary judgment, with points and authorities, and supported with evidence and sworn declarations from claimants as to the legitimate source of the defendant properties and monies. The documents were given to the prison officials to mail.

On February 3, 1993, the plaintiff replied to the claimant's opposition to the motion for summary judgment.

On February 18, 1993, claimants filed a request for leave to file a supplemental opposition to motion for summary judgment, and for a thirty (30) day extension of time to oppose the plaintiff's opposition of February 3, 1993. The basis of this motion was that numerous factual errors contained in the plaintiff's reply were prejudicial to claimants, and untrue contentions. Additionally, a thirty (30) day extension of time was necessary to prepare the claimants' opposition because to the difficulties in prison of access to the law library and typewriters. Often there are lockdowns without notice. Writing a legal document, or doing legal research, takes much longer for incarcerated persons.

On March 17, 1993, Claimants filed their motion to strike the erroneous portions of the "plaintiff's reply to claimants opposition to motion for summary judgment: memorandum of points and authorities." Prisoner claimants delivered that document to the prison officials for forwarding to the court.

Resp. App.

however, the clerk of the court filemarked the document on March 23, 1993.

A. THE DISTRICT COURT DOCKET INDICATES THAT CLAIMANTS' OPPOSITION PAPERS AND MOTION TO STRIKE ERRONEOUS FACTS IN PLAINTIFF'S MOVING PAPERS WAS NOT FILED

The claimants obtained a copy of the court docket of this case on March 29, 1993. Exhibit A. There is no entry of any of claimants' responses and oppositions to the motion for summary judgment, and thus it is likely that the district court did not give full review to the claimants' opposition to summary judgment and the lists of genuine issues of material facts that are in dispute with plaintiff's contentions.

There is a clear injustice in the case if the claimants' opposition to this unlawful seizure of property is not given full and fair review. There is no explanation on the docket of March 29, 1993, why claimants' responses and oppositions have not been docketed. There is no indication that the district court ever saw claimants' oppositions and responses before giving the government all of claimant's property valued in the millions.

Further, if the district court had read the pro se incarcerated claimants' responses, oppositions, and inventory of genuine issues of disputed material facts, and made a full and fair review of the factual dispute to the government's false claim, then the district court would not have granted the government's motion for judgment, as a matter of law,because the government was not entitled to judgment in its favor.

B, THE PRO SE CLAIMANTS' OPPOSITIONS, SWORN DECLARATIONS, EVIDENCE, AND EXPOSURE OF PLAINTIFF'S FALSE FACTS, SHOULD HAVE BEEN CONSTRUED LIBERALLY AS GENUINE ISSUES OF MATERIAL FACTS WHICH DEMONSTRATED, AS A MATTER OF LAW, PLAINTIFF WAS NOT ENTITLED TO JUDGMENT.

Pro se incarecerated litigants' pleadings are to be construed liberally

Resp. App. 73 a

according the Haines v. Kerner, 404 U.S. 519, 520 (1972) and a string of Ninth Circuit cases. Here, the Court should have construed pro se claimants' oppositions and motions to strike erroneous facts as statements of genuine issues of material facts which preclude summary judgment for the plaintiff.

This order is a terrible injustice to claimants and to the integrity of the judicial system because the plaintiff's affidavit and claim is tainted with the introduction of completely false accusations, alterations of truth, half-truths, alleged observations, conclusions "based on experience" and complete fabrications. The court must take judicial notice that there was never any ephedrine, methamphetamine, or glassware ever found in any location owned or controlled by claimants. The hydriotic acid is commonly used in similar gold-leaching, electroplating solutions.

Additionally, claimants' declarations were sworn under the penalty of perjury and stated the truth which directly refutes the plaintiff's erroneous claims. Those sworn declarations are sufficient by law, as evidence, to prevent summary judgment for the plaintiff.

1. **THE COURT DID NOT GIVE FULL AND FAIR REVIEW TO CLAIMANTS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE WITH THE PLAINTIFF'S "STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW", AND IF THE COURT HAD GIVEN SUCH REVIEW, THE RESULT WOULD HAVE BEEN DIFFERENT.**

The plainitff's "Statement of uncontroverted facts and conclusions of law" is highly inacurate, false in spots, inaccurate in spots, and erroneous in its unsupported (or falsely supported) conclusory claims. The plaintiff's contentions are great injustice, and are disputed by claimants as genuine issues:

Resp. App. 74 a

1. In plaintiff's ¶ 1, the truth is that none of the defendant items and properties are in fact derived from, or traceable to, or exchanged or used to facilitate, or conceal, or "involve in," any illegal or narcotic trade activities subject to Title 21 U.S.C. § 881 (a)(6) or Title 18, U.S.C. §§ 981 or 1956. There was never any specific drug transaction, or specific drug activities ever proved at the related criminal trial for indictment CR-329 (A)-DT. There was no connection between the defendant properties and any illegal activity at the criminal trial - none !

2. Plaintiff's first sentence is true. The second sentence is completely false. Only Arlt, Pierce, and Richard Lee were in the business of purchasing chemicals, as AAA Mineral Company, for Arlt's sales of a new mixture used in gold extraction by electrolysis. Wren operated Arlt's business Highland Towing with the assistance of James Hill. Kuhnle was a laborer for Wren. Gage had nothing to do with any of Arlt's business. House was a metallurgist and assayer for the ongoing gold mining business.

4. The sentence is false in that it claims that the chemicals were used for the manufacturing of methamphetamine. There was no such intent proved in the intire trial. No witness ever claimed to have purchased chemicals from claimants in order to make methamphetamine. Although some of the mining chemicals could have been used in drug manufacturing, none of claimants' chemical orders were ever used for illegal purpose or for any purpose other than the mining operation. Indeed, the chemicals purchased are some of the most widely used general purpose chemicals on the market. Absolutely no ephedrine, glassware or other essential methamphetamine ingredients was ever connected to the chemical purchases for the mining operation, and the Government did not have a single witness to any illegal acts.

Note: Plaintiff did not have a paragraph 3, and claimants wish to keep their answers correctly aligned to plaintiff's paragraph numbering, for clarity.

Resp. App. 75 a

5. The sentence is false. Only Claimant Arlt, and his aunt Deanna Marie Pierce, made the mining chemical purchases. Each and every purchase was cleared by notice to the Drug Enforcement Agency. Each and every chemical was intended for, and actually used for, the recovery, refining and finished production of micron gold. Complete records were kept for all purchases and sales of the chemicals. How can this be illegal ?

6. The sentence is true and nothing illegal is presented.

7. There was never a conspiracy to manufacture any amount of methamphetamine or any mixtrue containing any detectable amount of methamphetamine. Those businesses were legitimate. Second sentence reference to Exhibit 3 at 5, ¶ 1 is false.

8. Both these sentence are false. Defendant Arlt's mining operations were ligitimate. The chemicals purchased were ordered mixed with other chemicals to create a new solution for extraction of micron gold from high grade ore by electrolysis. This was a standard business practice done by many mining businesses.The new solutuon was sold in good faith to other legitimate mining customers. None of the solutions or chemicals ever made their way into drug dealers hands nor is there any witness or informant that testified in court that the chemicals purchased from Calabrian Chemical Company were ever used in the manufacture of any type of illegal drugs.

9. This paragraph is unfortunately and unjustly true. A direct appeal is pending. There were no witnesses that corroborated any Government claims. The convictions are a complete miscarriage of justice. Claimants are truly innocent.

10. Same as above.

11. Same as above. Hill was innocent yet convicted. Third and fourth sentences refer to Exhibits 1, 2, and 3, at ¶¶ 115, 116. 116 is completely false in all claims that Hill abmitted any illegal activity or money laundering

Resp. App. 76 a

12. First sentence is true. Second sentence is false, there was $153,000 in U.S. currency in the box. The police appear to have "lost" (stolen by police) $30,000 on their way to the station. The box was in a walk-in safe located at Mayhill Bail Bonds. This safe was used by claimant to store valuables for short periods of time. Reference to Exhibit 3 at ¶ 125 fails to mention 10 ounces of gold and 10 ounces of platinum that appear to have disappeared during the search. Again the police stole defendant's property.

13. First sentence is false. Second sentence, Exhibit 1 at ¶ 84 is false.

14 Unfortunately and unjustly true. Wren was illegally and unconstitutionally convicted although he was innocent of the charges.

15. First sentence is true. Second sentence, Exhibit 3 at ¶ 125 is false, (see #12 above). Third sentence is partially true, see #12. Fourth sentence is partially true, see #12.

16. True. Nothing herein is illegal.

17. First sentence is mischaracterized and misleading and therefore denied. Mr. Arlt (Chuck) Bailed out a few friends on occassion and "Millie" was a friend who needed as much business as she could get. All the bails were small and all the bailees appeared for court dates.

18. First sentence is true, second sentence is true, third sentence is true, fourth sentence is true. This was all legal activity.

19. First sentence is true, second sentence is true, third sentence is true, fourth sentence is false. Exhibit 3 at ¶¶ 115, 117, are irrelevant not illegal.

20. True.

21. True.

22. First sentence is vague and ambiguous and is denied as false on those grounds. Exhibit 3 at ¶ 121 is true.

Resp. App. 77a

23. First sentence is true. Second sentence Exhibit 3 at ¶ 122 is partially true, no gun was ever involved, as testified to at trial. Third sentence is false, denominations of cash were large not small. Fourth sentence is false. There was no gun anywhere. Fifth sentence is false, the boat is not in dry dock. Federal Officers moved the boat, and in the process damaged it, let it sink on purpose, despite claimants posting of a $5,000.00 bond to insure the boats safekeeping.

24. True, except for the description of payment and denominations of currency. Cash was in large denominations only. Same is true for Exhibit 3 at ¶ 123.

25. True. Exhibit 3 at ¶ 124 is true except for sentence 5 and 6 which misidentify "tailings" as "trailings". In sentence 6, only sampling was occurring in Nevada not production nor "trailing[sic]".

26. True. except that paper bag did not appear to have been buried, it was a plain, brown, crumpled paper bag. Exhibit 3 at ¶ 128 is partially true. The paper bag had not been buried, six cars were towed, five were driven, and the boat was towed behind one of the vehicles that was driven away.

27. First sentence is true. Second sentence in reference to Exhibit 3 at ¶ 129 is false. Jim Wren never possessed a gun or a badge. It is a fact that Deputy Eroe could not even identify Jim Wren at trial.

28. True.

29. True.

Resp. App. 78 a

CONCLUSION

The district court order made no mention of reviewing any of the claimants' oppositions, genuine issues of material facts in dispute, the motion to strike plaintiff's erroneous facts and claims, nor the pro se claimants' affidavits sworn under penalty of perjury.

The clerk's docket (exhibit A) of March 29, 1993 shows that claimants have been denied access to the court for review of their responses and defenses from the Government's wrongful conversion of private property under the guise and fiction of alleged illegal activity.

Summary Judgment for the plaintiff is incredible unjust when there are so many disputed material facts which were presented in the plaintiff's complaint and motion for judgment. Many of the claims presented in the plaintiff's affidavit were contrary to actual trial testimony, and concessions on cross-examination of the agents, that are on record in the underlying criminal trial of claimants in this matter.

The court must take judicial notice that there are no witnesses whatsoever produced by the government to any illegal act of drug trafficking, manufacturing, or money laundering.

The court must take judicial notice that there was no illegal purchase of chemicals because the D.E.A. rules were conplied with.

The court must take judicial notice that all money transaction had all proper and required forms completed.

The court must take judicial notice of the law that requires some connection of the defendant properties to some illegal activity before forfeiture is permitted, and that there is no illegal activity proved herein in fact, but rather illegal activity is "conclusory" upon speculation of agents and untruthful claims by agents who have no corraboration for any illegal act they claim.

Resp. App. 79 a

WHEREFORE, based on the above matters, and the verification of this document under penalty of perjury,claimants request the court to reconsider the Order of April 1, 1993, granting summary judgment to the plaintiff, and to review all of the claimants' responses under the "pro se" standard of liberal construction, and to view all the oppositions by claimants as "STATEMENTS OF GENUINE ISSUES" pursuant to Local Rule 7.14.2 and 7.14.3, and to reconsider the claimants' cross-motion for summary judgment.

Dated: April 9, 1993

Respectfully submitted,

JAMES ELI WREN, incarcerated
Pro Se claimant

CHARLES WESLEY, ARLT, incarcerated
Pro Se claimant,

VERIFICATION

I, JAMES ELI WREN, incarcerated pro se claimant, hereby declare under penalty of perjury that the above matters are true and correct to the best of my knowledge, belief, and information.

DateD: April 9, 1993

JAMES ELI WREN

I, CHARLES WESLEY ARLT, incarcerated pro se claimant, hereby declare under penalty of perjury that the above matters are true and correct to the best of my knowlegde, belief, and informations.

Dated: April 9, 1993

CHARLES WESLEY ARLT

Resp. App. 80 a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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U.S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

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USC 426

Resp. App. 81a

Charles W. Arlt 26889-048
3901 Klein Blvd.
Lompoc, CA 93436

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TITLE USA-V-$405089 U S CURRENCY

CAUSE CNFISCATION FORFEITURE 21:881 AMI(EX)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$405,089.23 U. S. CURRENCY;
$8,929.93 U. S. CURRENCY;
$123,000 U.S. CURRENCY;
ONE BELL 47 G-2 HELICOPTER,
U.S. Registration Number N59H;
STORMY SEAS FOUR (SHRIMP BOAT)
official number 2159;
ONE PIPER CHEROKEE 6 AIRPLANE;
ONE HUNDRED THIRTY-EIGHT (138)
SILVER BARS;
ONE 1985 JAGUAR,
VIN: SAJHV5842FC119348;
ONE 1981 WELLCRAFT,
VIN: HALLWELT1593G788;
ONE 1988 JAGUAR,
VIN: SAJHU164JC530324;
ONE 1986 PORSCHE,
VIN: WPOAA0940GN454897;
ONE 1988 JAGUAR,
VIN: SAJAV1643JC521364;
ONE 1986 CHEVROLET,
VIN: 1G8CS18RXG0140772;
ONE 1988 MITSUBISHI,
VIN: JA7FL24D9JP0505914;
ONE 1987 NISSAN,
VIN: JN6ND11S3HW033709;
ONE 1987 SUZUKI,
VIN: 1S4JC51C2H4154485;
ONE 1988 Jeep,
VIN: 2BCHV8157JR523469;
ONE 1988 Chevrolet,
VIN: 1GCFC24K0JZ253793;
ONE 1983 Chevrolet,
VIN: 1G8CS18B9D8132968,

Defendants.

MARK A FELDMAN
AUSA
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North Hollywood, CA 91607
818-505-0202
Clm Charles Hart

OFFICE USE ONLY: AMOUNT PAID / APPLYING IFP	DATE	FILING FEES PAID: RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS: CARD	DATE PUNCHED

jcw	1. Complt. Issd W/A. Case maybe ref'd to Mag judge Judge Eick for discov.
gk	2. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
gk	3. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication dated 7/7/91, executed on 7/3/91.
gk	4. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
gk	5. Retn orig warrant for arrest.
am	6. Proof of pbulication in the LA. Daily journal exc'td on 7-8-91
ca	7. Retn USM 285, Complt/Notc/Warrant, Seize on 7/18/91 1986 Porsche.
	8. Retn USM 285, Complt/Notc/Warrant, Sieze 1985 Jaguar on 7/18/91.
	9. Retn USM 285, Complt/ Notc/Warrant, Seize 1988 Mitsubishi on 7/18/91.
	10. Retn USM 285, Complt/Notc/Warrant, Seize 1986 Chevrolet Blazer S10 on 7/18/91.
	11. Retn USM 285, Complt/Notc/Warrant, Seize 1987 Nissan on 7/18/91.
	12. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jeep Comanche on 7/18/91.
	13. Retn USM 285, Complt/Notc/Warrant, seize 1988 Chevrolet 2500 on 7/18/91.
	14. Retn USM 285, Complt/Notc/Warrant, Seize 1983 Chevrolet on 7/18/91.
	15. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
	16. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
	17. Retn USM 285, Complt/Notc/Warrant, seize 1987 Suzuki on 7/18/91.
so	18. Retn USM 285, Complt/Notc/Warrant, seized property, 7/18/91.
	19. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
	20. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
	21. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
so	22. Retn USM 285, Complt/Notc/warrant, seizd vessel pursuant to seizure warrant, Biloxi MS, 7/25/91.
so	23. VERIFIED CLAIM & demand for retn of prop. claimant; Payback Mines.
	24. VERIFIED CLAIM & demand for retn of property. claimant, James Wren
	25. VERIFIED CLAIM & demand for retn of property. cliamant, Charles Arlt & Payback Mines.
	26. ANSWER & demand for jury Trial. clalimant, Payback Mines.
	27. ANSWER & demand for jury trial. claimant, Charles Arlt & Payback Mines.
	28. ANSWER & demand for Jury Trial. cliamant, James Wren.
so	29. ORD that cnsl show cause in writing, NLT 7/10/92 why this actn shluld not be dismissed or other sanctions imposed for non-compliance with local rule 6.2. M.O., C/R, P/A.
so	30. Resp to OSC by pltf.
so	31. Proof of publication 7/08/91.
jc	32. MO: tht cnsl show cause in wrtng nlt 5/18/92 why this actn shld not be dismd or other sanctions imposed for non compliance w/ LR. CR none
dr	33. Joint rpt of early meeting.

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Resp. App. 83 a

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO 91-3264
USA	US Currency $405,089.23	PAGE 3 OF ___ PAGES

DATE	NR	PROCEEDINGS
6/19/92	lp	34. Note that PTC is set for 1/4/93 @ 10 am.
7/9/92	tlt	35. ORD allowing subst of atty Lydia B. Sanchez in place of Carmine J. Colucci. clmnt Charles Arlt
9-2-92	sb	36. Ntc of assctn of cnsl clm
11-30-92	ab	37. ORD subst of atty himself in pro se in place of Lydia Sanchez.
12-4-92	ab	38. Ntc of mot & mot for S/J; memo of PA; decl in Mark A. Feldman. plf.rethl 12-28-92 @ 10:00 am. LODGED PROPSD ORD & STMT OF UNCONT FACT & CONCL OF LAW (FWD TO CRD)
12-10-92	ab	39. Ntc re svc of mot for S/J; decl of Mark A. Feldman. plf.
12-15-92	ab	40. Suppl ntc re svc of mot for S/J. plf.
12-17-92	ab	41. 2ND suppl ntc of re svc of mot for S/J. plf.
12-28-92	ab	42. Ntc that the crt ord plf to srv Charles Arlt purs to the subst of atty ord ent on 11-30-92 & to re-asrv Kenneth Miller cnsl for James Wren at his last Known address; the crt further ord that clmnts opp papers must be fld & srv by 1-19-93 and that plf reply papers must br fld & srv by 1-29-93; the crt ord there would not be a hrging on the mot and that the crts ruling would be based on the papers; the crt further orded that the PTC was cont until 2-8-93
12-28-92	ab	43. NO- plf -mot for S/J; crt directs the gov to reserve the mot papers by 12-30-92 on dft. Arlt. crts sets 1-19-93 as the opp due date and 1-29-93 as the reply due date; on 1-29-93 the mot will then stand submitted w/out oral argument; crt ords the PTC of 1-4-93 to be cont to 2-8-93 @ 10:00 am. C/R- Lu Anna Waamack.
1-4-93		LODGED ltn to sender cpy of No dated 12-28-92.

Resp. App.
84 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CLAIMANTS' MOTION FOR RECONSIDERATION OF APRIL 1, 1993 ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF, PURSUANT TO LOCAL RULE 7.16

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

U.S. ATTORNEY'S OFFICE ---------- One copy
312 North Spring Street
Los Angeles, California 90012

CLERK OF THE U.S. DISTRICT COURT
312 North Spring Street ---------- Original and One Copy
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 9th day of April 19 93

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
85 a

APPENDIX F

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Kline Blvd.
Lompoc, California 93436

Claimant in Pro Se

FILED
APR 22 4 02 PM '93

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23 U.S. CURRENCY; et al,. Defendants. CHARLES ARLT, JAMES WREN PAYBACK MINES, Claimants.	CASE NO. CV 91-3264 AWT (EEx) CLAIMANTS' REPLY TO THE PROSECUTOR'S OPPOSITIONS TO MOTION FOR RECONSIDERATION

Claimant, Charles Wesley Arlt, herein submits his reply to the plaintiff's opposition to claimant's motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

Claimants Wren and Arlt had submitted a motion for reconsideration of the court's order granting summary judgment to the government. The government oppossed the motion for reconsideration. The government opposition is wrong for the well established reason that triable issues of fact preclude summary judgment.

The government urges this court to ignore the claimant's statement of genuine issues of material facts in dispute.

Resp. App.
86 a

The government cites no authority whatsoever for its aggressive position that triable issues of fact can be ignored in this case. In its opposition on page 2, footnote 1, the government admits that the court docket does not reflect that the claimant's oppositions to summary judgment and claimant's statement of genuine issues of triable facts were filed or reviewed by the district court.

If claimants' oppositions to the government's motion for summary judgment (and claimant's pleadings containing statements of genuine issues of trial facts) were fully and fairly reviewed by the district court, and under "liberal construction" for pro se prisoner's pleadings, then this court would likely have complied with the case law precedents from the Supreme Court. The mere existence of a scintilla of evidence in support of the non-moving party's position is sufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby Inc. 106 S.Ct. 2505, 2512 (1986). See, Celotex Corp. v. Catrett, infra.

There is far more here than a "mere scintilla of evidence in support of the non-moving party's position." Claimants motion for reconsideration and statement of genuine issues of disputed facts show that there is not a single drug transaction connected to any defendant property under the "narcotic proceeds" theory. There is not a single instance of any money transaction that was not reported on 1099 IRS forms or currency transaction forms, when required, and there was never any concealment of the ownership of the funds.

However, the list of triable facts is greater and is presented in claimants' oppositions that were not fully and fairly reviewed, in the motion for reconsideration. "Summary judgment is appropriate where there are no genuine issues of material facts in dispute..." Celotex Corp. V. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

.....

Resp. App.
87 a

Moreover, claimants' declarations, sworn under penalty of perjury, are sufficient to preclude summary judgment, as a matter of law. United States v. Lot 4, Block 5 of Eaton Acres, 904 F.2d 487, 492 (9th Cir.1990).

The government does not deny that claimant's have a great dispute as to the facts that any illegal drug act is associated with the defendant properties.

Dated: April 24, 199?

Respectfully submitted,

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Kline Blvd.
Lompoc, California 93436

Resp. App.
88 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CLAIMANT'S REPLY TO THE PROSECUTOR'S OPPOSITION
TO MOTION FOR RECONSIDERATION.

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

CLERK OF THE U.S. DISTRICT COURT
312 NORTH SPRING STREET---------- Original and one copy
Los Angeles, California 90012

United States Attorney
Federal Building, Suite 7516 ---------- One copy
300 North Los Angeles Street
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 24 th day of April 19 93

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
89 a

NITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

APPENDIX G

CIVIL MINUTES — GENERAL

e No. CV91-3264 AWT: Date 5-11-93

e U.S.A. v. $405.089.23 U.S. CURRENCY, et al.

CKET ENTRY

ESENT:

HON. A. WALLACE TASHIMA, JUDGE

Lisa Chen
Deputy Clerk

None
Court Reporter

TORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

OCEEDINGS: MINUTE ORDER (IN CHAMBERS):

DEFENDANTS' MOTION FOR RECONSIDERATION

ORDERED that the motion is DENIED.

[illegible] THAT THIS DOCUMENT WAS SERVED BY [illegible] MAIL, POSTAGE PREPAID, TO ALL COUNSEL [illegible] AT THEIR RESPECTIVE MOST RECENT ADDRESS OF [illegible] IN THIS ACTION ON THIS DATE.

DATE 5-12-93

DEPUTY CLERK

UTES FORM 11
IL—GEN

D — M

Initials of Deputy Clerk

Resp. App.
90 a

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES W. ARLT, JAMES ELI WREN
Appellant/Petitioner CLAIMANTS,
$405,089.23 U.S. CURRENCY, DEFENDANT

CASE NO. 93-55947

vs.

Lower Court Docket Number:
CV-91-03264
Central California

UNITED STATES OF AMERICA
Appellee/Respondent

APPELLANT'S OR PETITIONER'S INFORMAL BRIEF

1. Jurisdiction

a. Timeliness of Appeal or Petition:

(i) Date of entry of judgment or order of district court: April 1, 1993 [ER 6-8[1/]]

(ii) Date of service of any motion made after judgment (other than for fees and costs): April 9, 1993 served in prison mail.

(iii) Date of entry of order deciding motion May 11, 1993 [ER 33]

(iv) Date notice of appeal or petition filed June 15, 1993 [ER 1-2]

(v) For prisoners, date you gave notice of appeal to prison authorities June 8, 1993 [ER 3]

b. PLEASE ATTACH ONE COPY OF EACH OF THE FOLLOWING:

1. The order from which you are appealing: [ER 6-8]
2. The district court's entry of judgment: [ER 6-8]
3. The district court docket sheet: Attached to brief.

1/ ER refers to "EXCERPTS OF RECORD" and is followed by a page number where the document is found in the accompanying Excerpts of Record.

Resp. App. 91a

2. What are the facts of your case?

Claimant James Eli Wren and Charles Wesley Arlt are pro se litigants, untrained in law, and incarcerated in the maximum level United States Penitentiary at Lompoc, California for criminal convictions now on direct appeal to the United States Court of Appeals for the Ninth Circuit.

Said convictions of Wren and Arlt are based on one alleged violation of federal drug law 21 U.S.C. § 846, conspiracy to manufacture methamphetamine, and for nineteen counts of alleged 18 U.S.C. § 1956 "money laundering." Case No. CR-91-0329.

Prisoner/Claimants Wren and Arlt submit this pro se appeal brief to this Court for review de novo with the entire short record below which is incorporated by reference herein, including all motions, answers, replies, oppositions, exhibits, declarations and memorandums of Points and Authorities submitted by the pro se claimants in defense of the defendant properties herein.

Claimants request this Court for de novo review and the liberal construction standard that the United States Supreme Court applies for pro se incarcerated litigants in Haines v. Kerner, 404 U.S. 150 (1972).

On June 12, 1991 claimants Charles Wesley Arlt and James Eli Wren were indicted by the plaintiff for one count of conspiracy to aid and abet manufacturing and 19 money laundering counts.(CR-91-0329)

On June 17, 1991 the same plaintiff, upon the exact same grounds, and criminal allegations, sought forfeiture of the defendant properties herein.

Resp. App.
92 a

On March 27, 1992, claimants Arlt and Wren were found guilty of the indictment charges. On December 4, 1992, the plaintiff filed its motion for summary judgment, with a statement of uncontroverted facts and conclusions of law, which requested summary judgment based on the claimants' convictions for the offenses alleged in the forfeiture complaint. See Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law (at ER 159: paragraphs 42, 43, 44) which state that plaintiff's ground for forfeiture is the convictions. However, claimants Arlt and Wren strongly disputed the plaintiff's conclusory fact allegations. Claimants presented their genuine issues of material facts in dispute supported with sworn declarations. ER 118-158

Althought the forfeiture complaint and judgment is based soley as punishment for the same criminal convictions, the actual issues of each defendant property seized and forfeited were never fairly and fully litigated in the criminal case on an individual basis.

The claimants' sworn declarations were not given review or contested by the plaintiff.

3. What did you ask the district court to do?

Claimants requested the court to return the defendant vehicles, money and properties because they were not illegal drug proceeds nor were the used to facilitate any illegal activity.

4. State the claims you raised at the district court.

See, pleadings below which are incorporated by reference herein.

Resp. App. 93 a

I.e. Claimants' opposition to plaintiff's Motion to Summary Judgment, claimant's Cross-Motions for Summary Judgment ER 52. Claimants Statement of Uncontroverted Facts and Conclusions of Law in Support of Cross-Motion for Summary Judgment ER 118-158; Claimants Motion for Reconsideration of April 1, 1993 order granting Summary Judgment to Plaintiff, pursuant to Local Rule 7.16 and Statement of Genuine Issues, ER 9-23; 29-32.

5. What issues are you raising on appeal?

ISSUES PRESENTED ON APPEAL

A. THE PRO SE CLAIMANTS INCORPORATE BY REFERENCE ALL OF THEIR PLEADINGS AND DEFENSES SUBMITTED BELOW.

B. THE JUDGMENT OF FORFEITURE MUST BE REVERSED IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT RULING THAT FORFEITURE OF PROPERTIES FOR ALLEGED DRUG LAW VIOLATIONS IS A MONETARY PUNISHMENT, AND AS SUCH, IS SUBJECT TO THE LIMITATIONS OF THE EXCESSIVE FINES AND PROPORTIONALITY PRINCIPLES OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

C. IN THE CONTEXTS OF MULTIPLE PUNISHMENTS AND SUCCESSIVE PROSECUTION, THE DOUBLE JEOPARDY CLAUSE APPLIES TO A MONETARY PUNISHMENT IN CIVIL DRUG FORFEITURES WHENEVER THE FORFEITURE IS USED IN ANY WAY TO PUNISH THE OWNER OF THE PROPERTY.

D. THERE WAS NO JURISDICTION TO SEIZE AND FORFEIT DEFENDANT PROPERTY NOT IN THE DISTRICT.

6. Did you present all these issues to the district court.

NOT ALL. If not, why?
yes/no

Issue A was presented to the district court. Issues B and C were new decisions from the United States Supreme Court on June 29, 1993, after the district court erroneously granted

Resp. App. 94 a

forfeiture to plaintiff. The new Supreme Court rulings are directly on point to the issues in claimants' forfeitures.

7. What law supports these issues on appeal? (You may, but need not, refer to cases and statutes.)

In light of the facts that the plaintiff confesses that it has sought this monetary punishment of CHARLES ARLT, and JAMES ELI WREN by forfeiture of their property, and it is based on the prior conviction and punishment for the exact same offense, claimants Arlt and Wren submit that their rights under the Fifth Amendment Double Jeopardy Clause, of the United States Constitution, have been violated, and the facts and law require reversal of judgment, and return of the property.

A. All of claimants' pleadings, motions, and responses below are incorporated by reference herein for review de novo. See, ER 118-159; 9-32.

B. THE JUDGMENT OF FORFEITURE MUST BE REVERSED IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT RULING THAT FORFEITURE OF PROPERTIES ALLEGED AS INSTRUMENTALITIES OF DRUG LAW VIOLATIONS IS A MONETARY PUNISHMENT, AND AS SUCH, IS SUBJECT TO THE LIMITATIONS OF THE EXCESSIVE FINES AND PROPORTIONALITY PRINCIPLES OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court held that civil drug forfeitures are punishment.

On June 29, 1993 the United States Supreme Court in Austin v. United States, ___U.S.___ (1993), No. 92-6073, 93 D.A.R. Daily Journal 8138 (June 29, 1993), held that the government's claim that civil drug forfeitures are merely remedial does not exclude them from review under the Excessive Fines Clause of the Eighth Amendment, so long as it can only be explained as serving in part, as punishMENT.

Resp. App. 95 a

"A review of English and American law before, and at the time of the Eighth Amendment, demonstrates that forfeiture generally and statutory in rem in particular historically have been understood, at least in part, as punishment". Id.

In Austin the Court declined to establish a test for determining whether a forfeiture is constitutionally "excessive," since prudence dictates that the lower courts be allowed to consider that question in the first instance. Id. Moreover, the Court held that since forfeitures (for conveyances and instrumentalities) are properly considered punishment today and that forfeiture provisions must tie the forfeiture directly to the commission of the drug offenses. Thus, even assuming that the forfeiture sections serve some remedial purpose, it cannot be concluded that forfeiture serves only that purpose. In the instant case, the plaintiff has not tied the forfeiture directly to any specific drug transaction, but rather the forfeiture of all the properties, cars and valuables is covered by a sweeping and general "conspiracy" without a single drug transaction (§841) connected to defendants..

Another important protection is the due process right to have the sentence proportional to the crime. Solem v. Helm, 463 U.S. 277 (1983)

The excessive fines clause of the Eighth Amendment may also impose limits on the state's ability to assess civil penalties in a given case. Under the California Constitution as well, civil penalties cannot exceed a defendant's ability to pay; a court may not assess a penalty that would bankrupt or render a defendant insolvent. This is clear from the discussion in Browning-Ferris Industries v. Kelco Disposal Inc., 492 U.S. 257 (1989). In that

Resp. App. 96a

case, the Supreme Court considered an excessive fines challenge to punitive damages awarded in a civil action between purely private parties. The court traced the origins of the Eighth Amendment in the Magna Carta and its concern with arbitrary taxes (called "amercements") levied by the sovereign. The kind of amercement or fine with which the framers of the Eighth Amendment (and the Magna Carta) were concerned was an arbitrary or special tax that a cash-strapped sovereign might be tempted to levy against a single individual or entity and on no one else.

Given the history of the Eighth Amendment, the Browning-Ferris Court held that an award of punitive damages between purely private parties does not violate the Eighth Amendment. However, if the sovereign received a portion of the penalty, the court suggested that the Eighth Amendment would be triggered. In the instant civil forfeiture penalty case the sovereign is taking the entire list of valuable properties, against only the claimants, in an arbitrary and capricious way, and thus the Eighth Amendment is triggered.

Indeed, since prosecution are seeking civil penalties of total forfeiture under federal drug law sections are precisely the sort of case that Browning-Ferris case was not, since the sovereign is the recepient of the penalty. That fact alone brings these instant forfeiture penalties within the Excessive fines clause of the Eighth Amendment and of Article 1, Section 17 of the California Constitution.

Claimants have already been convicted and punished for the same offense that the plaintiff bases this forfeiture punishment case upon: the "drug conspiracy." Also, it does not follow that

Resp. App. 97 a

even if a claimant was, arguendo, in a drug conspiracy, that that conspiracy tainted every piece of property the claimants owned. If that were that case, every person in the United States with any drug offense could lose their entire estate even when it was not connected to an offense. The plaintiff's theory would cause absurd results. The plaintiff is wrong and forfeiture proceedings here are not only unfounded but unconstitutional.

Under United States v. Austin, supra, all drug forfeiture cases must now be evaluated under the Eighth Amendment Constitutional standard of proportionality and the excessive fines and penalties provisions. In the Austin case, the defendant was caught using his business and mobile home during the drug transaction, and drugs were found in the mobile home. The United States Supreme Court has ruled that forfeiture is punishment and that it must be proportional to the offense. In the instant case, there has never been any evidence that the defendant properties were ever used to facilitate any drug offense of any kind. Therefore, the instant forfeiture judgment is not only unconstitutional for being a taking without due process, it is also not proportional to one drug conspiracy offense that the claimants were convicted of in federal court. No illegal activity was ever connected to the defendant properties. The judgment for forfeiture must be vacated and set aside.

The Supreme Court in Austin held that since the penalty is paid to the Sovereign as punishment for some offense (citing Browning-Ferris Industries, v. Kelco Disposal, 492 U.S. 257, 265 (1989) and as such, is subject to the limitations of the Eighth Amendment.

Resp. App. 98 a

In this forfeiture, claimants were not using the properties forfeited for facilitation or conveyance of any drug business or storage. Not one single defendant property was directly or even indirectly connected to any drugs. The $537,019.16 U.S. Currency, one Bell 47 G-2 Helicopter, One Stormy Seas Four (Trowler salvage boat), One Piper Cherokee 6 Airplane, One Hundred Thirty-Eight (138) Silver Bars, and Eleven (11) Vehicles and One Small Wellcraft boat. These items seized and forfeited had nothing to do with any drug activity. No drugs were found and none are listed on the warrant returns.

The Eighth Amendment prohibition against excessive fines is violated more in this instant case than in the Austin case just reversed by the United States Supreme Court. The judgment of forfeiture in this case is extrememly excessive and not tied directly or indirectly to any drugs. The Judgment should be reversed and dismissed for violation of, inter alia, the Eighth Amendment because it is excessive, it is a penalty, and it bears no proportionality to any illegal act in the motion for summary judgment.

C. FORFEITURE JUDGMENT MUST BE REVERSED, BECAUSE IN THE CONTEXTS OF MULTIPLE PUNISHMENTS AND SUCCESSIVE PROSECUTIONS, THE DOUBLE JEOPARDY CLAUSE APPLIES TO A MONETARY PUNISHMENTS IN CIVIL DRUG FORFEITURES OF ALLEGED CONVEYANCES AND INSTRUMENTALITIES WHENEVER THE FORFEITURE IS USED IN ANY WAY TO PUNISH THE OWNER OF THE PROPERTY.

On June 29, 1993, the United States Supreme Court affirmed that the Double Jeopardy Clause of the Fifth Amendment of the

Resp. App. 99 a

United States Constitution prohibits a second or successive punishment for an offense for which a defendant has already been punished. See, United States v. Dixon, ___U.S.___ (1993), No. 91-1231, 93 Daily Journal D.A.R. 8205.

When a subsequent punishment is based on or incorporates the same offense already punished, it is barred by the Double Jeopardy clause. Dixon, citing North Carolina v. Pearce, 395 U.S. 711 (1969). Dixon was a drug case. In Austin v. United States, supra, the Court reaffirmed United States v. Halper, 490 U.S. 435, 188 (1988), which held that civil forfeitures penalties are monetary punishments to which the Double Jeopardy Clause can apply. Austin was a drug civil forfeiture in rem case.

"Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can be explained as serving in part to punish. See United State v. Halper, 490 U.S. 435, 448." Austin at 8138.

Although Austin was primarily a reaffirment of the Eighth Amendment, the Court clearly overruled the government tactic of labeling civil drug forfeitures as remedial and established that drug forfeitures are punishment. The court held that even assuming that drug forfeiture statutes serve some remedial purpose, that argument must fail. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448. (Emhasis added by the Supreme Court in Austin).

Resp. App. 100 a

In the instant case the plaintiff has confessed that this forfeiture complaint is solely based on the criminal conviction in federal court and no other reason. The plaintiff's position was that there was no possible triable issue of fact because of the conviction. Every word of the plaintiff's legal theory demonstrates that this forfeiture is a successive punishment based on and incorporating the same offense for which claimants were previously punished.

The plaintiff was unable to connect the defendant properties to any illegal use themselves and simply used a blanket claim that the underlying drug conspiracy accusation conviction acted to collaterally estop the claimants from recovering these defendant properties. In light of the Supreme Court's decisions about civil drug forfeitures in Austin, supra, and double jeopardy in Dixion, the plaintiff respondent was wrong, and the judgment of forfeiture must be reversed and the properties returned to the claimants

D. THERE WAS NO JURISDICTION TO SEIZE AND FORFEIT DEFENDANT PROPERTY NOT IN THE DISTRICT.

The defendant property listed on the complaint as the "STORMY SEAS FOUR (SHRIMP BOAT) has been at all times in the Southern District of Mississippi. The district court never acquired in rem jurisdiction over the Res. ER 303 Rule C (2) of the Supplemental rules for Certain Admiralty and Maritime Claims states that the verified complaint must describe the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. See also, American Bank of Wage Claims v. Registry of the District Court of Guam, 431 F.2d 1215, 1218 (9th Cir. 1970).

Resp. App. 101 a

Without jurisdiction, the judgment of the district court must be reversed, and the property returned to claimants.

8. Do you have any other cases pending in this court? If so, give the name and docket number of each case.

Yes, the underlying criminal conviction of CR 91-0329 is on appeal as CA 92-50467, 92-50517. The opening brief was submitted on September 16, 1993.

9. Have you filed any previous cases which have been decided by this court? If so, give the name and docket number of each case.

No Cases.

Date: September 30, 1993.

Respectfully submitted,

CHARLES WESLEY ARLT
and for Payback Mines, Inc.,

Date: September 30, 1993.

JAMES ELI WREN

Resp. App. 102a

CERTIFICATE OF SERVICE

Case Name: $405,089,23 U.S. CURRENCY v. United States of America

Case No.: CV 91-3264- AWT

IMPORTANT: 2 copies of this brief and any attachments must be sent to ALL parties in this case. Please list below the names and addresses of the parties who were sent a copy of your brief and the dates on which they were served. Be sure to sign the statement below.

I certify that a copy of this brief and any attachments was served, either in person or by mail, on the persons listed below.

Signature
Notary NOT required

Name	Address	Date Served
MARK A FELDMAN AUSA	300 NORTH LOS ANGELES ST. LOS ANGELES, CALIF. 90012	9/30/93 10/1/93 (Both)

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YR.	J	N/S	O	D PFT	D DEF	A 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
													Newest $1,000	J				
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TITLE USA-V-$405089 U S CURRENCY

CAUSE CMPLT/FORFEITURE 21:881 AWT(EX)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$405,089.23 U. S. CURRENCY;
$8,929.93 U. S. CURRENCY;
$123,000 U.S. CURRENCY;
ONE BELL 47 G-2 HELICOPTER,
U.S. Registration Number N59H;
STORMY SEAS FOUR (SHRIMP BOAT)
official number 2159;
ONE PIPER CHEROKEE 6 AIRPLANE;
ONE HUNDRED THIRTY-EIGHT (138)
SILVER BARS;
ONE 1985 JAGUAR,
VIN: SAJNV5842FC119348;
ONE 1981 WELLCRAFT,
VIN: HALLWELT1593G788;
ONE 1988 JAGUAR,
VIN: SAJHU164JC530324;
ONE 1986 PORSCHE,
VIN: WPOAA0940GN454897;
ONE 1988 JAGUAR,
VIN: SAJAV1643JC521364;
ONE 1986 CHEVROLET,
VIN: 1G8CS18RXG0140772;
ONE 1988 MITSUBISHI,
VIN: JA7FL24D9JP0505914;
ONE 1987 NISSAN,
VIN: JN6ND11S3HW033709;
ONE 1987 SUZUKI,
VIN: 1S4JC51C2H4154485;
ONE 1988 Jeep,
VIN: 2BCHV8157JB523469;
ONE 1988 Chevrolet,
VIN: 1GCFC24K0JZ253793;
ONE 1983 Chevrolet,
VIN: 1G8CS18B9D8132968,

Defendants.

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CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
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UNITED STATES DISTRICT COURT DOCKET

DC 111 (Rev. 7/8)

Resp. App.
104 a

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Complt. Issd W/A.
Case maybe ref'd to Mag judge Judge Eick for discov.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication dated 7/7/91, executed on 7/3/91.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
Retn orig warrant for arrest.
Proof of pbulication in the LA. Daily journal exc'td on 7-8-91
7. Retn USM 285, Complt/Notc/Warrant, Seize on 7/18/91 1986 Porsche.
8. Retn USM 285, Complt/Notc/Warrant, Sieze 1985 Jaguar on 7/18/91.
9. Retn USM 285, Complt/ Notc/Warrant, Seize 1988 Mitsubishi on 7/18/91.
10. Retn USM 285, Complt/Notc/Warrant, Seize 1986 Chevrolet Blazer S10 on 7/18/91.
11. Retn USM 285, Complt/Notc/Warrant, Seize 1987 Nissan on 7/18/91.
12. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jeep Comanche on 7/18/91.
13. Retn USM 285, Complt/Notc/Warrant, seize 1988 Chevrolet 2500 on 7/18/91.
14. Retn USM 285, Complt/Notc/Warrant, Seize 1983 Chevrolet on 7/18/91
15. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
16. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
17. Retn USM 285, Complt/Notc/Warrant, seize 1987 Suzuki on 7/18/91.
18. Retn USM 285, Complt/Notc/Warrant, seized property, 7/18/91.
19. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
20. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
21. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
so 22. Retn USM 285, Complt/Notc/warrant, seizd vessel pursuant to seizure warrant, Biloxi MS, 7/25/91.
so 23. VERIFIED CLAIM & demand for retn of prop. claimant; Payback Mines.
so 24. VERIFIED CLAIM & demand for retn of property. claimant, James Wren
25. VERIFIED CLAIM & demand for retn of property. cliamant, Charles Arlt & Payback Mines.
26. ANSWER & demand for jury Trial. clalimant, Payback Mines.
27. ANSWER & demand for jury trial. claimant, Charles Arlt & Payback Mines.
28. ANSWER & demand for Jury Trial. cliamant, James Wren.
so 29. ORD that cnsl show cause in writing, NLT 2/10/92 why this actn shluld not be dismissed or other sanctions imposed for non-compliance with local rule 6.2. M.O., C/R, 1/A.
so 30. Resp to OSC by pltf.
so 31. Proof of publication 7/08/91.
jc 32. MO: tht cnsl show cause in wrtng nlt 5/18/92 why this actn shld not be dismd or other sanctions imposed for non compliance w/ LR. CR none
dc 33. Joint rpt of early meeting.

Resp. App. 105 a

CIVIL DOCKET CONTINUATION SHEET

PF	DEFENDANT	DOCKET NO ...
		PAGE ___ OF ... PAGES

	NR	PROCEEDINGS
	ab	54. Ntc of joinder and mot to join all submission . clmnt in pro se.
		55. Decl of clmnt James Eli Wren in suppt of ntc of joinder & mot to join all submission . clmnt pro se.
	ab	56. MOt to strike erroneous portions of plfs reply to opp to mot for S/J; memo of PA. clmnt pro se.
	ab	57. Stamtement of uncontroberted facts & conclusion of law-the dft properties are forefeitable to the plf USA. (ENT 4-1-93). mldcpys.
		58. JUDGMENT- plf mot for S/J was submitted w/out oral argument; the after considering the papers fld in connection wiht the mot GR plf mot; ord that plf mot for S/J is GR and title to all of the dft properties is vested in the USA; furtner ord that clmnts shall have no further interest in the dft properties. (ENT 4-1-93) (MDJS6) mldcpys/ntc. ENTERED ON ICMS
	ab	LODGED Rtn to sender cpy of jgm fld on 3-29-93 ent on 4-1-93.
	ab	59. MOt for reconsideration of 4-1-93 ord GR S/J to plf purs to L/R 7.16.clmnt. pro se.
	kr	60. Opp to clmnts mot for recon of summ jgm; Memo of P/A..plf
93	la	61.Reply to the prosecutor's opps to mot for reconsideration. clmnt/Arlt
93	la	62.MO: dfts' mot for reconsideration is ORD DEN. (c/r n/a).
93	kr	RTN to sndr a M.O. of 5/11/93 addressed to Kenneth Miller rsn forwarding ORD exp.
-93	CH	63. DFTS & CLAIMANTS, CHARLES WESLEY ARLT, JAMES ELI WREN AND PAYBACK MINES, INC., FLD NTC OF APP TO THE 9TH CCA FRM JGM FLD 3-29-93 & ENT 4-1-93; AND FRM ORD FLD 5-11-93. FEES BILLED. $105.00 FLG & DOCKET FEES. PTY SVD: MR. CHARLES WESLEY ARLT, MR. JAMES ELI WREN: PAYBACK MINES, INC., & AUSA MARK A. FELDMAN, ESQ. ON 6-21-93.
/93	la	64.Applic & ORD for Charles Wesley Arlt as follows: DEN as to Payback Mines & Wren. GR as to individual dfts Arlt only. Let the appplic proc w/o prepymnt of cost or fees or the necissity of ginving security therefor. (re ntc of appeal)
93	la	65.NTc of desig of rcd on appeal. clmnts Arlt, Wren & Payback Mines
-93	ab	66. ORD- re appeal in form a pauperis : mot & afdt; the crt has considered the mo & the mot is DENIED.

Resp. App.
106a

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APPENDIX I

NO. 93-55947

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

$405,089.23 U.S. Currency,
et al,

Defendants.

CHARLES ARLT, JAMES WREN,
PAYBACK MINES,

Claimants-Appellants.

APPELLEE'S OPPOSITION BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Resp. App.
107 a

TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		iii
I.	ISSUES PRESENTED	2
II.	STATEMENT OF THE CASE	2
A.	THE NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW	2
B.	JURISDICTION AND TIMELINESS	3
III.	PRELIMINARY STATEMENT	3
IV.	STATEMENT OF THE FACTS	4
A.	ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION	4
B.	TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE	6
1.	Defendant Properties Specifically Addressed In The Criminal Case	6
2.	Defendant Properties Not Specifically Addressed In Criminal Case	7
V.	THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE GOVERNMENT	10
A.	STANDARD OF REVIEW	10
B.	PLAINTIFF ESTABLISHED PROBABLE CAUSE AND CLAIMANT FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO A LEGITIMATE SOURCE OF INCOME	11
1.	Defendant Properties Were Forfeitable On Narcotics "Proceeds Theory"	12
a.	Plaintiff's probable cause burden	12
b.	Reliance upon circumstantial evidence and hearsay	14
c.	Probable cause is judged by the aggregate of facts	14
2.	Defendant properties also were forfeitable on money laundering theory	17

Resp. App. 108a

a. The Statutory Framework 18

b. Defendants Were "Involved In" or Derived From Violations Of Section 1956 And Therefore Are Forfeitable 19

VI. CLAIMANTS ARE COLLATERALLY ESTOPPED FROM DENYING THAT THEY LAUNDERED NARCOTICS PROCEEDS 21

VII. FORFEITURE OF NARCOTICS PROCEEDS WOULD NEVER VIOLATE THE EIGHTH AMENDMENT 22

VIII. FORFEITURE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT 25

IX. CLAIMANTS WAIVED ANY JURISDICTION DEFENSE AND THE SEIZURE AND FORFEITURE WERE WITHIN THE COURT'S JURISDICTION 27

A. CLAIMANTS WAIVED ANY DEFENSE UNDER TERRITORIAL JURISDICTION OR VENUE 27

B. THE RES DID NOT NEED TO BE WITHIN THE DISTRICT FOR THE COURT TO PROPERLY EXERCISE JURISDICTION AND VENUE 28

X. CONCLUSION 29

Resp. App. 109 a

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1985) 11

Austin v. United States,
113 S.Ct. 2801 (1993) 22

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 24

Helvering v. Mitchell,
303 U.S. 391 (1937) 26

Lipofsky v. New York St. Worker's Comp. Bd.,
861 F.2d 1257 (11th Cir. 1988) 27

Luben Industries, Inc. v. United States,
707 F.2d 1037, (9th Cir. 1983) 21

Robi v. Five Platters, Inc.,
838 F.2d 318 (9th Cir. 1988) 21

United States of America v. 1982 Yukon Delta Houseboat,
774 F.2d 1432 (9th Cir. 1985) 14

United States of America v. $5,644,540 in U. S. Currency,
799 F.2d 1357 (9th Cir. 1986) 12, 14

United States of America v. $83,310.78 in U.S. Currency,
851 F.2d 1231 (9th Cir. 1988) 13, 14

United States of America v. $93,685.61 in U.S. Currency,
730 F.2d 571 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105
S.Ct. 119, 83 L.Ed.2d 61 (1984) 13, 14

United States of America v. Dickerson,
873 F.2d 1181 (9th Cir. 1988) 13

United States of America v. Padilla,
888 F.2d 642 (9th Cir. 1989) 13, 19

United States v. 56-Foot Yacht Named Tahuna,
702 F.2d 1276 (9th Cir. 1983) 10, 12, 13, 14, 19

United States v. $29,959 U.S. Currency,
931 F.2d 549 (9th Cir. 1991) 15

United States v. $31,697.59 Cash,
665 F.2d 903 (9th Cir. 1982) 21

Resp. App.
110 a

United States v. Accounts Nos. . . ,
971 F.2d 974 (3rd Cir. 1992) 28, 29

United States v. All Monies,
754 F. Supp. 1467 (D. Haw. 1991) 19

United States v. Borromeo,
995 F.2d 23 (4th Cir. 1993) 24

United States v. Bucuvalas,
970 F.2d 946, (1st Cir. 1992) cert. denied, __ U.S. __,
113 S.Ct. 1382-83 (1993) 24

United States v. Certain Real Property, Commonly Known as 6250 Ledge Rd., Egg Harbor, WI, 943 F.2d 721 (7th Cir. 1991) . . . 22

United States v. Feldman,
853 F.2d 648 (9th Cir. 1988), cert. denied,
489 U.S. 1030 (1989) 24

United States v. Halper,
490 U.S. 435, 109 S.Ct. 1892 (1989) 26

United States v. Martin,
933 F.2d 609 (8th Cir. 1991) 20

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1983) 25

United States v. Porcelli,
865 F.2d 1352 (2d Cir.) cert. denied, 493 U.S. 810 (1989) . . 24

United States v. Sarbello,
985 F.2d 716 (3rd Cir. 1993) 22

United States v. Thomas,
913 F.2d 1111 (4th Cir. 1990). 15

Various Items of Personal Property v. United States,
282 U.S. 577 (1931) 25

Constitution: PAGE

Eighth Amendment 2, 22, 23, 25, 26

Fifth Amendment 2, 26, 27

Resp. App.
111a

I

ISSUES PRESENTED

A. Whether the district court erred in concluding that claimant failed to raise a material issue of fact and in granting summary judgment for plaintiff.

B. Whether forfeiture of the defendant property violates the Excessive Fines Clause of the Eighth Amendment.

C. Whether forfeiture of the defendant property violates the Double Jeopardy Clause of the Fifth Amendment.

D. Whether claimants waived their right to challenge jurisdiction or venue by failing to raise either issue in a responsive pleading or pre-answer motion. If not whether the district court could exercise jurisdiction over the defendant vessel (Stormy Seas Four).

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

This is a civil forfeiture case in which the United States of America ("the government") alleged in its Complaint for Forfeiture (Court Record 1[1]) that the defendant properties were forfeitable to the government. The government filed a motion for summary judgment on December 4, 1992 (CR 38) and claimant opposed this motion. CR 53. On April 1, 1993 the court granted the government's motion for summary judgment and entered judgment for

---

[1] Hereinafter, the Court Record will be abbreviated "CR". A copy of the complete docket sheet is attached to the Excerpt of Record.

Resp. App. 112 a

the government. CR 58.

B. JURISDICTION AND TIMELINESS

This court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its Judgment of Forfeiture on April 1, 1993. CR 58. Claimants served their motion for reconsideration on April 9, 1993, nine days after entry of judgment. (CR 59). Treating the motion as one under Rule 59, Fed.R.Civ.Pro., the filing of the motion tolled the period in which to file the notice of appeal. On May 11, 1993 the court denied claimants' motion for reconsideration. On June 15, 1993, Charles Arlt and James Wren ("claimants") timely filed their notice of appeal. CR 63.

III

PRELIMINARY STATEMENT

Claimant Charles Arlt ("Arlt") was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and seventeen counts of money laundering and claimant James Wren ("Wren") was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and thirteen counts of money laundering. Jim Hill was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and one count of money laundering, relating specifically to $405,089.23 that is the subject of this action. Anita Gage was convicted of conspiracy to manufacture methamphetamine. In total, Wren, Arlt and Hill were convicted of laundering over $1,630,000 from July 1990 through March 1991.

The above convictions alone were enough to establish

Resp. App. 113 a

probable cause to believe that the defendant properties, all of which were owned and purchased by Arlt and Wren, were the proceeds of their illegal methamphetamine activities. Moreover, the convictions also established probable cause to believe that all of the defendant properties were involved in or traceable to acts of money laundering.

Probable cause was further bolstered by the following uncontroverted facts. Arlt's company Payback Mines controlled the bank accounts that contained the $8,929.93 that is a subject of this action. The Piper Cherokee 6 airplane, Bell 47 helicopter, Stormy Seas Four shrimp boat and the eleven vehicles were purchased with $253,700 cash, within approximately thirty-five days of each other, from December 30, 1990 to February 1, 1991. Wren delivered $123,000 in cash to Millie Mayhill for safekeeping. Possession and expenditure of large amounts of cash is evidence of narcotics activity in the Ninth Circuit and many other circuits. Finally, claimants offered no evidence of any legitimate income in opposition to plaintiff's motion. Accordingly, plaintiff submits that the district court did not err in granting the government's motion for summary judgment.

IV

STATEMENT OF THE FACTS

A ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION

1. Arlt and his associates purchased cashier's checks, transferred funds and caused the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals used in the manufacture of methamphetamine. CR 38 (Motion for

Resp. App. 114a

Summary Judgment); (Appellee's Excerpt of Record at 36-38).[2]

2. Arlt and his associates made direct purchases of and ordered chemicals used in the manufacture of methamphetamine. AER at 40-52.

3. Arlt and his associates stored the chemicals in storage facilities, distributed and arranged for and took delivery of the chemicals. Id. at 36-52.

4. Arlt purchased and/or established several business entities which he used to transact business, including Highland Towing, Inc., AAA Minerals and claimant Payback Mines. Id. at 109, 115, 84, 90.

5. Arlt and his associates attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by Arlt in Nevada and California. No such mining operations in fact existed. CR 57 at ¶ 8 (Statement of Uncontroverted Facts and Conclusions of Law, entered on April 1, 1993).

6. Arlt, Wren and Hill were convicted on each and every count alleged against them in the Indictment. On March 27, 1992, Arlt was convicted of nineteen counts of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and of money laundering in violation of 18 U.S.C. § 1956(a)(1), and Wren was convicted of fifteen counts of the same criminal violations. AER at 35-68, 69.

7. James Hill was convicted of conspiracy to manufacture

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[2] Hereinafter, Appellee's Excerpt of Record will be abbreviated "AER".

Resp. App. 115a

methamphetamine and of laundering approximately $400,000, in violation of 18 U.S.C. § 1956(a)(1). Id. at 69. This act of laundering involved the $405,089.23 that is the first defendant listed in the caption in this case.

8. Rejecting any defenses offered by claimants in the criminal case, such as that Arlt and Wren were in the gold mining business, Arlt, Wren and Hill were convicted of laundering approximately $1,630,000 from July 1990 through March 1991.

B. TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE

1. Defendant Properties Specifically Addressed in The Criminal Case

a. SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23

9. Count 22 of the Indictment charged Hill with attempting to launder approximately $400,000. AER at 68. Hill was convicted of attempting to launder these funds. Id. at 69.

b. $123,000 IN U.S. CURRENCY

10. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. AER at 121-22. A cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant. Id.

11. Count 2 of the Indictment, in Paragraph 84, accused Wren of transporting $123,000 from Security Pacific to Mayhill Bail Bonds. AER at 52.

12. Wren was convicted on Count 2 of the Indictment. AER at 69.

Resp. App. 116a

2. Properties Not Specifically Addressed in Criminal Case

a. 138 Silver Bars

13. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. In addition to the above-mentioned $123,000, 138 silver bars were seized during the search. AER at 121-22.

14. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. Millie Mayhill ("Mayhill") was read her Miranda warning and she consented to a taped discussion. Id. During this taped conversation with Mayhill, Mayhill advised that her brother is Jim Wren. Id. Mayhill explained that in January 1991 Wren brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room." Id.

15. Mayhill stated that she had known "FAT CHUCK", whose real name is Charles Arlt, for three years as Arlt would come to her business to bail a lot of his people out of jail. Id.

b. BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-04649; 01964-04854

16. Two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be Arlt, Wren and Hill. AER at 118-19. Highland Towing was a business entity owned and controlled by Arlt. Id.

17. On March 28, 1991, Wren opened a third account in the name of Payback Mines, which was a business entity owned by Arlt.

Resp. App. 117a

Only Jim and Regina Wren had signature authority on this account. Id. This account, no. 01964-04854, was supposed to receive the $405,089.23 that was the subject of Hill's money laundering conviction under Count 22.

c. **BELL 47 HELICOPTER -- U.S. REGISTRATION NUMBER - N 59 H**

18. On Sunday, January 20, 1991, a man who introduced himself as Wren came to Edward Mauldin's place of business, named Sundance Helicopters, to purchase a helicopter. AER at 119. After taking Wren and an associate of Wren's for a test flight, Wren agreed to purchase the helicopter for $65,000. Id. Wren presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in Wren's briefcase. Id. Most of the cash was in $100 bills with some in $50 and $20 denominations. Id.

19. Wren requested that the helicopter be registered in the name of Payback Mines. Id. Wren also signed the bill of sale, signing as the vice president of Payback Mines. Id. Mr. Mauldin witnessed Wren's signature and mailed the completed bill of sale to the FAA. Id.

d. **STORMY SEAS FOUR (SHRIMP BOAT) - OFFICIAL NUMBER 2159**

21. On or around January 30, 1991, Wren purchased this boat at an auction for $51,700. AER at 119-20.

22. Wren paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Id. Most of the bills were in small denominations. Id. While counting the money one of Wren's associates, earlier identified as his son, pulled out a

Resp. App. 118 a

gun and laid it on the table for an unstated reason. Id. The boat was in dry dock for repairs in Biloxi, Mississippi immediately before being seized by federal agents of the IRS. Id.

23. Claimants admit that the boat was seized pursuant to a seizure warrant issued by United States Magistrate Judge John M. Roper, Southern District of Mississippi on April 11, 1991.

e. **PIPER CHEROKEE 6 AIRPLANE**

24. On or about Sunday, December 30, 1990, Wren and Arlt came to Larry Oyers' business, named Western Cardinal, Inc., to look at a Piper Cherokee 6 airplane. AER at 120-21. On or about Monday, January 7, 1991, Oyers received a telephone call from Wren, who stated that Arlt wanted to buy the airplane on that day. Id. Wren and Oyers met at Redlands Aviation on January 7, 1991. Id. After an inspection of the airplane the two drove to Highland Towing Company. Id. After agreeing on a price of $32,000, Wren presented Oyers with a brown paper bag containing $32,000 in U.S. currency. Id. Most of the cash was in small denominations. Id.

25. Wren requested that the airplane be registered in the name of Payback Mines. Id. Oyers witnessed Wren sign the bill of sale as vice president of Payback Mines. Id.

f. **ELEVEN AUTOMOBILES AND ONE BOAT**

26. On February 1, 1991, Wren purchased eleven cars and one boat from an auction, for a total of approximately $105,000. AER at 122-23. Wren paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. Id. Wren

Resp. App. 119 a

registered all of the cars to Payback Mines at 27110 East Third Street, the address of Highland Towing. Id.

27. Arlt was with Wren when he made the above-described purchase. Id.

28. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with Wren and Arlt. Id. Mr. Martin said that Arlt signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. Id. Arlt had Wren sign the Department of Motor Vehicle documents for the vehicles. Id. Mr. Martin recalled that the cash used to purchase the vehicles was in twenties and hundreds, and was inside a very dirty brown paper bag. Id. Mr. Martin felt that Arlt was directing the transaction as Wren filled out some documents and a female that was with them filled out other documents. Id.

29. On or about May 2, 1991, each of the defendant properties was seized pursuant to seizure warrants. CR 38.

V

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE GOVERNMENT

A. STANDARD OF REVIEW

The Court reviews de novo a grant of summary judgment. United States v. 56-Foot Yacht Named Tahuna, 702 F.2d 1276 (9th Cir. 1983). However, summary judgment procedures must be judged in light of the statutory law of forfeitures. Id. at 1281.

Resp. App. 120a

B. PLAINTIFF ESTABLISHED PROBABLE CAUSE AND CLAIMANT FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO A LEGITIMATE SOURCE OF INCOME

Summary.judgment is appropriate when one party sets forth uncontroverted facts sufficient for judgment and the opposing party fails to raise a material issue of fact to be resolved at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1985). Rule 56(c), Federal Rules of Civil Procedure, provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings . . . on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id. Furthermore, "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." Liberty Lobby, Inc., 477 U.S. at 252.

The Ninth Circuit has made it clear that summary judgment in civil forfeiture cases must be analyzed in the context of the forfeiture laws.

> Summary judgment procedures under Rule 56 . . . must necessarily be construed in the light of the statutory law of forfeitures, and particularly the procedural requirements set forth therein.

Resp. App. 121a

United States v. One 56 Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1983); United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1361 (9th Cir. 1986). The relevant forfeiture statutes were 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The government submits that summary judgment was proper under both theories.

1. Defendant Properties Were Forfeitable On Narcotics "Proceeds Theory"

Title 21 section 881(a)(6) of the United States Code provides for forfeiture to the United States of all proceeds of narcotics activities or property traceable to such proceeds.[3]

a. Plaintiff's probable cause burden

The burden of proof in civil forfeiture actions is set forth in 19 U.S.C. § 1615. United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986). Section 1615 provides that to succeed in an action for forfeiture it is the plaintiff who has the initial burden. To satisfy this burden

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[3] Title 21, Section 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Resp. App. 122a

plaintiff must establish probable cause. In a civil forfeiture action under 21 U.S.C. § 881(a) the "government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction." Id. at 1362; United States of America v. Dickerson, 873 F.2d 1181, 1184 (9th Cir. 1988).

Probable cause is a question of law to be decided by the court. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984); United States of America v. Padilla, 888 F.2d 642, 643 (9th Cir. 1989).

It is well established that the standard for showing probable cause in a civil forfeiture case is no greater than for a search warrant. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1984). Plaintiff must show that there is more than a mere suspicion that the real property is connected to illegal drug transactions. "Probable cause is shown if the government produces 'less than prima facie proof but more than mere suspicion.'" United States of America v. $83,310.78 in U.S. Currency, 851 F.2d 1231, 1235 (9th Cir. 1988) (citation omitted).

In $83,310.78 in U.S. Currency, the court upheld a judgment of forfeiture after concluding that the "government had shown that there was more than a mere suspicion that the seized currency was connected to an illegal drug transaction." Id. at 1235 (emphasis added).

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Resp. App.
121a

b. Reliance upon circumstantial evidence and hearsay

To make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties were connected to drug transactions. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983).

Plaintiff may make its probable cause showing by relying upon circumstantial evidence. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984). Furthermore, such evidence need not be admissible at trial if the court deems it adequate and sufficiently reliable. United States of America v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1434 (9th Cir. 1985).[4] "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." Tahuna, 702 F.2d at 1283.

c. Probable cause is judged by the aggregate of facts

In deciding whether the United States has established probable cause, the Court must look to the aggregate of facts. United States v. $83,310.78 in U.S. Currency, 851 F.2d 1231 (9th Cir. 1988); United States v. $5,644,540 U.S. Currency, 799 F.2d 1362.

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[4] Accordingly, reliance on the Affidavit of Special Agent Mullins, the Indictment and Criminal Minutes, and other documentary evidence is appropriate. Id. at 1282-83.

Resp. App. 124 a

> Probable cause is shown if 'the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or intended to be exchanged for drugs.'

$83,310.78, 851 F.2d at 1235 (citing $5,644,540 U.S. Currency.)

In United States v. $29,959 U.S. Currency, 931 F.2d 549, 553 (9th Cir. 1991), the court held that possession of large amounts of currency is strong evidence of drug trafficking.

> Cash amounting to $29,959 is an 'extremely large amount' to be kept in the home. . . This alone is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.

Similarly, the use of large amounts of cash to purchase properties is evidence of drug trafficking and that drug proceeds were used to purchase such properties. See United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990).

The convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and money laundering were sufficient for probable cause by themselves. Nevertheless, with each of the defendant properties there was additional evidence that clearly established probable cause.

First, with regard to the $405,089.23, James Hill was convicted of attempting to launder this money. This conviction, under 18 U.S.C. § 1956(a)(1), established that the defendant money was obtained from an unlawful activity, that being

Resp. App. 125 a

methamphetamine trafficking.

Second, Wren was convicted on Count 2 of the Indictment, which incorporates Paragraph 84, relating to the $123,000 that Wren transported to Mayhill Bail Bonds. Furthermore, the extremely large amount of currency itself bolstered the existence of probable cause.

Third, the $8,929.93 seized from three bank accounts, was also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on these accounts, indicating that the money was a proceed of their methamphetamine trafficking. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. The fact that this account was also in the name of one of Arlt's companies, also supported the finding of probable cause.

Fourth, probable cause for the Bell 47 Helicopter was further supported by the fact that it was purchased with cash for $65,000. Furthermore, the aircraft was placed in the name of Arlt's business, Payback Mines.

Fifth, forfeiture of the Stormy Seas Four shrimp boat was further supported by the fact that it was purchased with $51,700 in currency. Like the helicopter, this fishing vessel was placed in the name of Arlt's business, Payback Mines.

Sixth, probable cause for the Piper 6 Cherokee Airplane was bolstered by the purchase of the aircraft with $32,000 in currency. Like the above two properties, the airplane also was placed in the name of Arlt's business, Payback Mines.

Resp. App. 126a

Seventh, the eleven automobiles and one boat were purchased with $105,000 in cash at an auction. Like the above helicopter, fishing vessel and airplane, the eleven vehicles and one boat also were placed in the name of Arlt's business, Payback Mines.

For the above stated reasons, plaintiff submits that it established probable cause to believe that each of the defendant properties was forfeitable as a proceed of claimants' illegal narcotics activities, under 21 U.S.C. § 881(a)(6). Furthermore, claimants failed to offer any evidence of a legitimate source of income, such as tax returns or other business records. Accordingly, claimants failed to create a material issue of fact as to their purchase of the defendant properties with proceeds of methamphetamine transactions.

2. Defendant properties also were forfeitable on money laundering theory

Plaintiff alleged that the defendant properties were forfeitable under 18 U.S.C. § 981(a)(1). Pursuant to section 981(a)(1)(A), the government established probable cause to believe that the defendant properties were "involved in" or traceable to properties "involved in" violations of 18 U.S.C. § 1956(a)(1)(B). Accordingly, such properties were forfeitable to the government.

The defendant properties were "involved in" violations of 18 U.S.C. § 1956(a)(1)(B) or were traceable thereto because: the defendant properties were derived from a "specified unlawful activity", namely, the manufacture and sale of methamphetamine; and, the defendants were involved in financial transactions

Resp. App. 127a

designed to conceal the nature, location, source, ownership, or control of the properties.

a. The Statutory Framework

Section 981(a)(1)(A) provides that any property "involved in" a violation of 18 U.S.C. § 1956, the money laundering statute, or traceable to such property, is forfeitable to the government.[5] To establish a money laundering violation, the government had to establish probable cause to believe that each property was involved in a financial transaction; each transaction involved property derived from a "specified unlawful activity", methamphetamine activities for instance; and that each transaction was designed to conceal the location, source, ownership or control of that defendant property.[6]

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[5] Section 981(a)(1)(A) provides:

> Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

[6] Title 18, section 1956(a)(1) defines money laundering as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

The term "specified unlawful activity" includes the violation of the federal narcotics laws. See 18 U.S.C. § 1956(c)(&)(A) and 18 U.S.C. § 1961(1).

Resp. App. 128a

b. Defendants Were "Involved In" or Derived from Violations of Section 1956 and Therefore Are Forfeitable

The government had to establish probable cause to believe that the defendant properties were "involved in" or traceable to money laundering violations. See United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991); United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).[7]

The government submits that claimants' convictions of numerous counts of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering, were sufficient to establish probable cause. Accordingly, the district court did not err in concluding that the defendant properties were involved in financial transactions, were derived from methamphetamine activities, and were designed to conceal the location, source or the ownership of the defendant properties. Below, is a brief analysis of the probable cause for each defendant.

First, with regard to the $405,089.23, James Hill was convicted of attempting to launder this money. Therefore, it was obviously involved in an "attempted" money laundering transaction

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[7] As under 21 U.S.C. § 881(a)(6), to make its probable cause showing, the government had to offer evidence that was "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties represent the proceeds of claimant's methamphetamine activities. See United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983); United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991). The standard for establishing probable cause is more than a mere suspicion but less than a preponderance of the evidence. All Monies, 754 F. Supp. at 1471; United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

Resp. App. 129a

and was automatically forfeitable.

Second, Wren was convicted of conspiracy to commit money laundering in Count 2 of the indictment, which incorporates Paragraph 84. Paragraph 84 alleged that Wren transported $123,000 from Security Pacific Bank to Mayhill Bail Bonds. The conviction alone established probable cause.

Third, the $8,929.93 seized from three bank accounts, was also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on this account, which supported the conclusion that the money was "involved in" or traceable to their methamphetamine activities. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt, which also supported the conclusion that the funds were traceable to methamphetamine activities. Therefore, it also supported the finding of probable cause.

The purchase of the Bell 47 Helicopter, the Stormy Seas Shrimp boat, the Piper 6 Cherokee Airplane, and the eleven automobiles and one boat, using over $250,000 in cash and putting these properties in the name of Payback Mines, established probable cause to believe that each transaction was designed to conceal the source, ownership, and control of the properties. See United States v. Martin, 933 F.2d 609 (8th Cir. 1991) (putting property in the name of a third party evidences an intent to conceal or disguise.)

Accordingly, plaintiff submits that the court below properly

Resp. App. 130 a

found that probable cause was established and that the claimants failed to offer any evidence to rebut plaintiff's showing of probable cause. Therefore, claimants failed to create any material issue of fact and summary judgment for the government was proper.

VI

CLAIMANTS ARE COLLATERALLY ESTOPPED FROM DENYING THAT THEY LAUNDERED NARCOTICS PROCEEDS

Claimants' convictions collaterally estop them from arguing that they never committed acts of money laundering. United States v. $31,697.59 Cash, 665 F.2d 903 (9th Cir. 1982). Courts apply a three-step test to determine whether collateral estoppel applies. Luben Industries, Inc. v. United States, 707 F.2d 1037, (9th Cir. 1983). First, there must be a final judgment. Second, the issue decided in the prior adjudication must be the same as the one presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party to the prior adjudication. Id.

Each of these requirements is met. Claimants' convictions without question constitute a final judgment. Robi v. Five Platters, Inc., 838 F.2d 318, 327 (9th Cir. 1988). The appeal of their convictions does not affect the finality of their convictions for purposes of collateral estoppel. Id. Thus, the judgment/convictions established that claimants were guilty of money laundering in violation of 18 U.S.C. § 1956(a)(1) and that they conspired to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(a) and 846. Furthermore, the convictions

Resp. App. 131 a

established that the purchase and use of chemicals by claimants was to manufacture methamphetamine rather than to facilitate a purported gold mining business.

There is no question that the laundering of over $1,600,000 of narcotics proceeds, for which the claimants were convicted, is a central issue in this forfeiture case. Obviously, claimants were party to their own criminal cases and their convictions constitute final judgments. Accordingly, the three requirements for collateral estoppel are met and claimants should be collaterally estopped from arguing that they did not launder proceeds of methamphetamine activities or that their methamphetamine operation was actually a gold mining business instead.

VII

FORFEITURE OF NARCOTICS PROCEEDS WOULD NEVER VIOLATE THE EIGHTH AMENDMENT

Relying on Austin v. United States, 113 S.Ct. 2801 (1993), claimants argue that forfeiture of the defendant properties would violate the Eighth Amendment. The burden is upon claimants to convince the Court that this forfeiture would be "excessive" under the Eighth Amendment. United States v. Certain Real Property, Commonly Known as 6250 Ledge Rd., Egg Harbor, WI, 943 F.2d 721 (7th Cir. 1991). Accord United States v. Sarbello, 985 F.2d 716, 724 (3rd Cir. 1993). Claimants cannot satisfy their burden of proof.

In Austin, the Supreme Court held that although civil in rem forfeitures may have a remedial purpose, they also serve a

Resp. App. 132a

punitive purpose. Therefore, such forfeitures must be subject to the Excessive Fines Clause of the Eighth Amendment. The Court explicitly declined the opportunity to adopt a test to analyze this issue and remanded the case for a determination of whether forfeiture would violate the Eighth Amendment. Id. at 2812.

Austin is distinguishable from the instant case for one pivotal reason. The forfeiture in Austin was based on a "facilitation" theory under 21 U.S.C. §§ 881(a)(4),(7). In Austin, the government sought to forfeit an entire piece of property although only a portion of the property was used to facilitate the narcotics activity.

This appeal, however, involves only the forfeiture of "proceeds" of illegal narcotics activities under 21 U.S.C. § 881(a)(6). Even under Austin, such a forfeiture would never violate the Eighth Amendment. Austin held that the Excessive Fines Clause "prohibits only the imposition of "excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event. " Id. at 2812 n.14. Forfeiture of criminal proceeds[8] cannot by any stretch of imagination or logic be characterized as "punitive"; it is entirely "remedial" as it serves merely to place the non-innocent owner in the same position as if no crime had ever been committed. As such, it "cannot be considered 'excessive' in any event." Id.

Depriving a money launderer or drug dealer of his criminal

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[8] The term "criminal proceeds" or "proceeds" shall be used herein to designate both the direct proceeds of criminal activity an any property traceable to such proceeds.

Resp. App. 133a

proceeds should never be considered punitive for the simple reason that "[t]he money, though in [the launderer's] possession, is not rightfully his . . . ." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989). Moreover, forfeiture of such proceeds does not require the drug dealer or money launderer to give up anything in which he had a lawful ownership interest. The Ninth Circuit adopted this reasoning in United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989).

> When the district court orders that the defendant forfeit the profits gained from illegal activity, it is hard to imagine how such a forfeiture could constitute cruel and unusual punishment. . .
>
> The jury found that Feldman had received $1,986,990 in insurance proceeds from . . . arsons. Forfeiture of that amount was not excessive.

Id. See, United States v. Porcelli, 865 F.2d 1352, 1366 (2d Cir.) cert. denied, 493 U.S. 810 (1989) ("We note, too, that the forfeiture verdict simply deprives [defendant] of the fruits of his crime . . . ."); United States v. Bucuvalas, 970 F.2d 946-48, (1st Cir. 1992) cert. denied, __ U.S. __, 113 S.Ct. 1382-83 (1993).

Similarly, the Fourth Circuit has recently held that the forfeiture of drug proceeds was remedial. United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993). To allow drug

Resp. App. 134a

dealers to retain such "assets would frustrate a remedial purpose of the provision permitting forfeiture of the proceeds of illegal activity." Id. at 27.

Accordingly, the government submits that under no circumstances can the forfeiture of criminal proceeds violate the Eighth Amendment. Therefore, claimants have not and cannot satisfy their burden of proof on this issue.

VIII

FORFEITURE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

As far back as 1931 the Supreme Court recognized that double jeopardy does not apply to in rem civil forfeiture actions.

> A forfeiture proceeding under [the tax laws] is in rem. . . . The forfeiture is no part of the punishment for the criminal offense. . . . The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.

Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (citations omitted) (emphasis added).

The rule established by Various Items of Personal Property has been reaffirmed in several Supreme Court cases. In United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1983), involving the forfeiture of illegally possessed firearms, the Court held that double jeopardy is not triggered by a civil forfeiture action following an acquittal in a related criminal case.

Resp. App. 135a

In Helvering v. Mitchell, 303 U.S. 391, 399 (1937), Justice Brandeis held that a civil action to enforce a tax penalty was not barred by an acquittal in a related criminal case.

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.

Furthermore, the court in Borromeo, supra, stated clearly that forfeiture of the proceeds of illegal activity cannot violate the Double Jeopardy Clause. Borromeo, 995 F.2d at 27.

Relying on Austin and United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), claimants attempt to argue that forfeiture of the defendant properties would violate the Double Jeopardy Clause of the Fifth Amendment. Claimants' argument is without merit, as neither of these cases supports claimants' position. Accordingly, as with their Eighth Amendment argument, claimants cannot satisfy their burden of proof with respect to this Fifth Amendment issue.

First, Austin involved the Eighth Amendment rather than the Fifth Amendment. Second, as established above, Austin clearly should not apply to "proceeds" cases, as the forfeiture of criminal proceeds is remedial, not punitive. Applying Austin, under no circumstances should a remedial forfeiture be deemed so excessive as to be criminal. Therefore, under no circumstances should a remedial forfeiture invoke the double jeopardy clause.

Resp. App.
136 a

The Halper case also does not support claimant's argument. On its face Halper "creates a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."

Under no circumstances can the forfeiture of narcotics proceeds be considered punishment. It simply deprives a drug dealer of assets not lawfully his. Therefore, based on the above Supreme Court authority, plaintiff submits that the forfeiture of narcotics proceeds cannot constitute a violation of the Double Jeopardy Clause of the Fifth Amendment. Accordingly, there should be no doubt that this in rem civil forfeiture action does not trigger the double jeopardy clause of the Fifth Amendment.

IX

CLAIMANTS WAIVED ANY JURISDICTION DEFENSE AND THE SEIZURE AND FORFEITURE WERE WITHIN THE COURT'S JURISDICTION

A. CLAIMANTS WAIVED ANY DEFENSE UNDER TERRITORIAL JURISDICTION OR VENUE

The law is abundantly clear that a party waives any defense of personal jurisdiction or venue if such defense is not initially plead or the subject of a pre-answer motion.[9] Fed.R.Civ.Pro. 12(h)(1). See Lipofsky v. New York St. Worker's Comp. Bd., 861 F.2d 1257 (11th Cir. 1988). Claimants failed to

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[9] Subject matter jurisdiction may not be waived. There is no question, however, that claimants are not challenging subject matter jurisdiction, as district courts clearly have original jurisdiction over forfeiture matters. 28 U.S.C. §§ 1345, 1355.

Resp. App. 137a

assert either a jurisdiction or venue challenge, in the court below. Accordingly, claimants waived their right to assert any defect in jurisdiction or venue and the Court should not consider any arguments on these issues.

B. THE RES DID NOT NEED TO BE WITHIN THE DISTRICT FOR THE COURT TO PROPERLY EXERCISE JURISDICTION AND VENUE

Claimants appear to argue that since the defendant vessel was never brought within this venue, the lower court lacked authority to forfeit the defendant. Claimants' argument is without merit because it was not necessary to transport the vessel from Mississippi to the Central District of California under 21 U.S.C. § 881(j).

Section 881(j) provides in pertinent part:

> [A] proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

In passing this venue provision, Congress intended to eliminate the requirement that the defendant res had to be located in the judicial district where the forfeiture action was pending, during the pendency of the forfeiture action. See United States v. Accounts Nos. . ., 971 F.2d 974, 980 (3rd Cir. 1992) (the res does not need to be located in the district where the forfeiture action is pending if the forfeiture action was

Resp. App. 138a

pending in the same district as the criminal prosecution).[10] Here, both the forfeiture case and the criminal case were filed in the Central District of California. Accordingly, even if the Court were to disregard claimants' waiver of these issues, claimants have failed to articulate a meaningful challenge to the jurisdiction or venue in the action below.

X

CONCLUSION

For all of the above reasons and authorities, and based upon the entire record, the judgment of the district court should be affirmed.

Dated: November 15, 1993

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
ERIC HONIG
Assistant United States Attorney
Chief, Asset Forfeiture Section

MARK A. FELDMAN
Assistant United States Attorney
Attorneys for Plaintiff-Appellee

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[10] The court in United States v. Accounts Nos. . ., raised an issue that claimants have not raised, regarding the service of process beyond the jurisdictional boundaries of the district court. Id. at 981-84. At that time statutory authority to do so did not exist. Congress has since authorized nationwide service of process in 21 U.S.C. § 1355(d).

Resp. App.
139a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff/Appellee v. $405,089.23 U.S. Currency, et al., Defendants.	NO. 93-55947 DECLARATION OF SERVICE BY MAIL
CHARLES ARLT, JAMES WREN, PAYBACK MINES, Claimants/Appellants.	

I, Lisa Stotsenberg, declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is Federal Building, Suite 7516, 300 North Los Angeles Street, Los Angeles, California 90012; that I am over the age of 18 years, and am not a party to the above-entitled action; that on November 15, 1993, I deposited in the United States mails in the Federal Building, 300 North Los Angeles Street, Los Angeles, California, in the above-entitled action, in an envelope bearing requisite postage, a copy of:
APPELLEE'S OPPOSITION BRIEF

addressed to: See attachment.

at his/her last known address, at which place there is a delivery service by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 15, 1993. Lisa Stotsenberg
LISA STOTSENBERG

Service List

1. Charles Wesly Arlt
No. 26889-048
3901 Kline Blvd.,
Lompoc, California 93436

2. James Eli Wren
No. 96377-012
3901 Kline Blvd.,
Lompoc, California 93436

EDITORIAL NOTES

References in Text. The Controlled Substances Act, referred to in subsecs. (a)(1)(B), (i)(1), is: Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21, and Tables volume.

The Supplemental Rules for certain Admiralty and Maritime Claims, referred to in subsec. (b) in provisions preceding par. (1), are set out under Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in subsec. (b)(2), are set out under this title.

Section 3 of the Anti Drug Abuse Act of 1986, referred to in subsecs. (e), (i)(1), is section 3 of Pub.L. 99–570, which is set out as a note under section 801 of Title 21.

Section 490(a)(1) of the Foreign Assistance Act of 1961, referred to in subsec. (i)(1)(C), is section 490 of Pub.L. 87–195, Pt. I, as added Pub.L. 102–583, § 5(a), Nov. 2, 1992, 106 Stat. 4924, which is classified to section 2291j(a)(1) of Title 22, Foreign Relations and Intercourse.

Codification. Amendment of subsec. (i)(1)(C) pursuant to section 102(b) of Pub.L. 103–447, which directed that "paragraph (1)(A) of" preceding "section 481(h)" be deleted, could not be executed since the language to be stricken had been deleted in the 1990 amendment pursuant to Pub.L. 101–647.

Pub.L. 103–447, § 103(a), repealed Pub.L. 102–583, § 6(a), set out in the credit. Repeal served to undo the 1992 change in text of subsec. (i)(1)(C) under Pub.L. 102–583 and return the text to subsec. (i)(1)(C) as if no change in text had ever occurred.

Amendment by section 3531 of Pub.L. 101–647 directed the placement of a period at the end of subsec. (d) of this section. A period had already been editorially placed at the end of such subsec., therefore, no further change was required.

Effective Date of 1994 Amendments. Section 330011(s)(2) of Pub.L. 103–322 provided in part that the amendment made by such section, amending directory language of section 2525(a)(2) of Pub.L. 101–647 (which amended this section), was to take effect on the date section 2525(a)(2) of Pub.L. 101–647 took effect; section 2525(a)(2) of Pub.L. 101–647 took effect on the date of enactment of Pub.L. 101–647, which was approved Nov. 29, 1990.

Effective Date of 1992 Amendments. Substitution of "section 490 of the Foreign Assistance Act of 1961" for "section 481(h) of the Foreign Assistance Act of 1961" by section 6(a) of Pub.L. 102–583 effective Oct. 1, 1992, see section 6(a) of Pub.L. 102–583, set out as a note under section 2291h of Title 22, Foreign Relations and Intercourse.

Except as otherwise provided, amendment by Pub.L. 102–550 effective Oct. 28, 1992, see section 2 of Pub.L. 102–550, set out as a note under section 5301 of Title 42, The Public Health and Welfare.

Separability of Provisions. If any provision of Pub.L. 101–73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101–73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101–73, set out as a note under section 1811 of Title 12, Banks and Banking.

Severability Clause. Section 1367 of Pub.L. 99–570 provided that: "If any provision of this subtitle [Pub.L. 99–570, Title I, Subtitle H] or any amendment made by this Act [Pub.L. 99–570, Oct. 27, 1986, 100 Stat. 3207–39] or the application thereof to any person or circumstances is held invalid, the provisions of every other part, and their application, shall not be affected thereby."

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under—

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the

Resp. App. 142 a

Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3707-39, and amended Pub.L. 100-690, Title VI, §§ 6463(c), 6464, Nov. 18, 1988, 102 Stat. 4374, 4375; Pub.L. 101-73, Title IX, § 963(c), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title XIV, §§ 1401, 1403, Title XXV, § 2525(b), Nov. 29, 1990, 104 Stat. 4835, 4874; Pub.L. 102-393, Title VI, § 638(e), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(b), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, § 1512(c), Oct. 28, 1992, 106 Stat. 4058; Pub.L. 103-322, Title XXXIII, § 330011(s)(1), Sept. 13, 1994, 108 Stat. 2145.)

EDITORIAL NOTES

Effective Date of 1994 Amendments. Section 330011(s)(1) of Pub.L. 103-322 provided in part that the amendment made by such section, amending section 1401 of Pub.L. 101-647 (which amended this section), was to take effect on the date section 1401 of Pub.L. 101-647 took effect; section 1401 of Pub.L. 101-647 took effect on the date of enactment of Pub.L. 101-647, which was approved Nov. 29, 1990.

Separability of Provisions. If any provision of Pub.L. 101-73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101-73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101-73, set out as a note under section 1811 of Title 12, Banks and Banking.

Severability Clause. See note set out under section 981 of this title.

§ 984. Civil forfeiture of fungible property

(a) This section shall apply to any action for forfeiture brought by the Government in connection with any offense under section 1956, 1957, or 1960 of this title or section 5322 or 5324 of title 31, United States Code.

(b)(1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or other fungible property—

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.

(2) Except as provided in subsection (c), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section.

(c) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.

Resp. App.
143 a

beginning after the date of enactment of this Act [Sept. 13, 1994]."

Effective Date of 1987 Amendment. Amendment by Pub.L. 100-182 applicable with respect to offenses committed after enactment of Pub.L. 100-182, which was approved Dec. 7, 1987, see section 26 of Pub.L. 100-182, set out as a note under section 3006A of this title.

Effective Date of 1986 Amendment. Section 8(c) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 9(b) of Pub.L. 99-646 provided that: "The amendments made by this section [subsec. (b) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 80(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (d) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 81(b) of Pub.L. 99-646 provided that: "—The amendments made by this section [amending subsec. (a) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 1007(b) of Pub.L. 99-570 provided that: "(b) The amendment made by this section [enacting subsec. (d) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Authority to Lower Sentences Below Statutory Minimum for Old Offenses. Section 24 of Pub.L. 100-182 provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub.L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code [subsec. (e) of this section];

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code [sections 991 et seq. of Title 28, Judiciary and Judicial Procedure],

shall apply in the case of an offense committed before the taking effect of such guidelines."

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

Editorial Notes

References in Text. Title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, are Titles II and III of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, which are principally classified to subchapters I and II of chapter 13 of Title 21, Food and Drugs.

Section 413 of such Act, referred to in text, is section 413 of Pub.L. 91-513, added Pub.L. 98-473, Title II, c. III, part B, § 303, Oct. 12, 1984, 98 Stat. 2044, which is classified to section 853 of Title 21.

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Editorial Notes

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Resp. App. 144 a

cation, or rehabilitation as alternatives to conviction or criminal penalty for offenses involving any drug or other substance subject to control under any such treaty or agreement.

(Pub. L. 91-513, Title II, § 412, as added Pub. L. 95-633, Title I, § 107(a), Nov. 10, 1978, 92 Stat. 3773.)

§ 853. Criminal forfeitures

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Third party transfers

(c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Protective orders

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

Resp. App. 145a

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

Warrant of seizure

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Execution

(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

Disposition of property

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

Authority of the Attorney General

(i) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

Applicability of civil forfeiture provisions

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

Bar on intervention

(k) Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

Resp. App. 146 a

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Jurisdiction to enter orders

(l) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

Depositions

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

Third party interests

(n)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Construction

(o) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

Resp. App. 147a

Forfeiture of substitute property

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(Pub.L. 91–513, Title II, § 413, as added Pub.L. 98–473, Title II, § 303, Oct. 12, 1984, 98 Stat. 2044, and amended Pub.L. 98–473, Title II, § 2301(d)–(f), Oct. 12, 1984, 98 Stat. 2192, 2193; Pub.L. 99–570, Title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207–13, 3207–54.)

Editorial Notes

Codification. The language of section 1153(b) of Pub.L. 99–570, amending this section by the relettering of subsec. (p) as (q) and addition of a new subsec. (p) was executed by the addition of a new subsec. (p), but no relettering of prior subsec. (p) since such prior subsec. (p) had been relettered (o) by Pub.L. 98–473, Title II, § 2301(e)(2), Oct. 12, 1984, 98 Stat. 2193.

Amendment by section 1153(b) of Pub.L. 99–570 was executed to section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (this section) as the probable intent of Congress, despite directory language purporting to require the amendment of section 413 of title II of the "Comprehensive Drug Abuse Prevention and Control Act of 1975".

The amendatory language of section 1864(1) of Pub.L. 99–570, directing the substitution of "subsection (n)" for "subsection (o)" in the second subsection (h) [originally enacted as (*l*) and relettered (h) by section 2301(e)(2) of Pub.L. 98–473] was executed to such relettered subsec. (h) which was subsequently relettered as (k) by section 1864(4) of Pub.L. 99–570.

The amendatory language of section 1864(3) of Pub.L. 99–570 directing the substitution of "this subchapter" for "this chapter" in subsec. (i)(1) was executed by the substitution of "this subchapter" for "this section" as the probable intent of Congress.

§ 853a. Transferred to § 862

§ 854. Investment of illicit drug profits

Prohibition

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of Title 18 to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any violation of this subchapter or subchapter II of this chapter after such purchase do not amount in the aggregate to 1 per centum of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Penalty

(b) Whoever violates this section shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"Enterprise" defined

(c) As used in this section, the term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Construction

(d) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(Pub. L. 91–513, Title II, § 414, as added Pub. L. 98–473, Title II, § 303, Oct. 12, 1984, 98 Stat. 2049.)

§ 855. Alternative fine

In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(Pub. L. 91–513, Title II, § 415, as added Pub. L. 98–473, Title II, § 2302, Oct. 12, 1984, 98 Stat. 2193.)

§ 856. Establishment of manufacturing operations

(a) Except as authorized by this title, it shall be unlawful to—

(1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;

Resp. App. 148 a

APPENDIX K

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1994 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES WESLEY ARLT, Defendant.	CR 91-329(B)-DT S E C O N D S U P E R S E D I N G I N D I C T M E N T [21 U.S.C. §§ 846, 841(a)(1): Conspiracy to Aid and Abet the Manufacture of Methamphetamine; 18 U.S.C. § 371: Conspiracy to Launder Monetary Instruments; 18 U.S.C. § 1956(a): Laundering of Monetary Instruments; 18 U.S.C. § 2: Aiding and Abetting and Causing an Act to be Done; 21 U.S.C. § 853: Criminal Forfeiture]

The Grand Jury charges:

JWJ.jwj

COUNT ONE

[21 U.S.C. §§ 846, 841(a)(1); 18 U.S.C. § 2; 21 U.S.C. § 853]

I. OBJECTS OF THE CONSPIRACY

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within the Central District of California and elsewhere, defendant CHARLES WESLEY ARLT and coconspirators Anita Gage, James Eli Wren, Daryle Eugene House, Deanna Marie Pierce, James Rocky Hill, Robert Kuhnle (hereinafter collectively referenced as the "identified coconspirators"), and others both known and unknown to the Grand Jury, knowingly and intentionally conspired and agreed with each other to commit the following offenses against the United States:

1. To knowingly and intentionally aid and abet the manufacture of 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and Title 18, United States Code, Section 2.

2. To knowingly and intentionally manufacture 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Resp. App. 150 a

II. MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO BE ACCOMPLISHED

The objects of the conspiracy were to be accomplished in substance as follows:

1. Defendant Arlt and the identified coconspirators supplied chemicals used in the manufacture of methamphetamine, including hydriodic acid and red phosphorous, to other coconspirators, who in turn manufactured methamphetamine. Defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren wire transferred the funds necessary to purchase hydriodic acid from banks within the Central District of California to bank accounts in Texas controlled by coconspirator Deanna Marie Pierce. Defendant CHARLES WESLEY ARLT and coconspirator Anita Gage also transported United States currency to the Texas banks. Defendant CHARLES WESLEY ARLT and coconspirator Deanna Marie Pierce deposited the currency into the Texas bank accounts controlled by coconspirator Deanna Marie Pierce.

2. Coconspirator Deanna Marie Pierce and another coconspirator established a company called AAA Minerals Company (hereinafter "AAA Minerals"). Coconspirator Deanna Marie Pierce thereafter ordered hydriodic acid from Calabrian International, Inc. (hereinafter "Calabrian"), a chemical manufacturing and distribution company, on behalf of AAA Minerals. Coconspirator Deanna Marie Pierce wire transferred the funds for the hydriodic acid purchases from the Texas bank accounts that she controlled to Calabrian, and requested shipment either to a warehouse facility in Texas or to warehouse facilities within the Central District of California. All of the hydriodic acid solution

Resp. App. 151a

ultimately was to be transported to San Bernardino County, California.

3. Defendant CHARLES WESLEY ARLT, coconspirators James Eli Wren, Robert Kuhnle, and another coconspirator accepted delivery of the hydriodic acid in San Bernardino County, California. Defendant CHARLES WESLEY ARLT, coconspirators James Eli Wren, Robert Kuhnle, and another coconspirator then transported the hydriodic acid to Highland Towing Company (hereinafter "Highland Towing"), a towing business owned by defendant CHARLES WESLEY ARLT, located in Highland, California. While at Highland Towing, unknown individuals scraped the labels and stencils that identified the contents of the drums as hydriodic acid from the drums in order to avoid detection by law enforcement.

4. Coconspirators Robert Kuhnle and James Eli Wren transported hydriodic acid from Highland Towing to Anita Gage and others, who took possession of the hydriodic acid. The hydriodic acid was to be used to manufacture methamphetamine.

5. Coconspirator Anita Gage located individuals to purchase the hydriodic acid, and distributed the hydriodic acid to those individuals. Those individuals then manufactured and attempted to manufacture methamphetamine with the hydriodic acid. Coconspirator Anita Gage accepted United States currency and methamphetamine in exchange for the hydriodic acid, and in turn sold the methamphetamine for United States currency.

6. Defendant CHARLES WESLEY ARLT and coconspirator Daryle Eugene House purchased and took delivery of red phosphorous, a chemical used to manufacture methamphetamine. Defendant CHARLES WESLEY ARLT and coconspirator Daryle Eugene House further

Resp. App. 152a

distributed the red phosphorous to individuals who manufactured or intended to manufacture methamphetamine with it.

7. Coconspirator James Rocky Hill arranged for the delivery of hydriodic acid and red phosphorous to other coconspirators, provided security to the coconspirators, and took custody of monies generated by and for the conspiracy.

8. Defendant CHARLES WESLEY ARLT and coconspirators James Eli Wren, James Rocky Hill, and Regina Wren used some of the monies generated by the conspiracy to purchase items in order to corroborate their cover story that they were in the mining business and to conceal the narcotics proceeds.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the objects of the conspiracy, defendant CHARLES WESLEY ARLT, the identified coconspirators, and others committed various overt acts within the Central District of California and elsewhere, including but not limited to the following:

1. On or about January 17, 1989, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

2. On or about October 26, 1989, defendant CHARLES WESLEY ARLT purchased approximately 13 pounds of lidocaine, a chemical used to dilute or "cut" methamphetamine, from Chem Lab Supplies, Placentia, California.

3. On or about November 1, 1989, defendant CHARLES WESLEY ARLT purchased approximately 10 gallons of hydriodic acid and

Resp. App. 153a

other chemicals and apparatus used in the production of methamphetamine from Chem Lab Supplies, Placentia, California.

4. In or about December 1989, defendant CHARLES WESLEY ARLT and another coconspirator purchased hydrochloric acid and four pumps at Chem Lab Supplies, Placentia, California. 5. On or about January 25, 1990, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

6. On or about February 2, 1990, another coconspirator ordered approximately 2,800 pounds of hydriodic acid solution costing approximately $23,800, from Calabrian, to be available for customer pick up in Texas on or about February 12, 1990. This order was later changed to 4,000 pounds of hydriodic acid solution, costing approximately $33,000.

7. In or about February 1990, coconspirator Anita Gage carried approximately $30,000 in United States currency from the Central District of California to Texas, to be used for the purchase of hydriodic acid solution.

8. On or about February 9, 1990, coconspirator Deanna Marie Pierce purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,000, made payable to Calabrian.

9. In or about February 1990, defendant CHARLES WESLEY ARLT and coconspirator Anita Gage travelled from the Central District of California to Texas, for the purpose of taking delivery of hydriodic acid solution.

Resp. App. 154a

10. On or about February 12, 1990, defendant CHARLES WESLEY ARLT picked up approximately 4,000 pounds of hydriodic acid solution from Calabrian's facility in Port Neches, Texas.

11. On or about February 15, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about February 22, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

12. On or about February 20, 1990, coconspirator Deanna Marie Pierce purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,157.62, made payable to Calabrian.

13. On or about February 22, 1990, at a warehouse facility at 209 South Friendswood Drive, Friendswood, Texas, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian.

14. On or about February 23, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about March 12, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

15. On or about March 14, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $33,000 from Community National Bank in Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

Resp. App. 155a

16. In or about April, 1990, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren purchased and took delivery of approximately 500 pounds of red phosphorous from Great Lakes Chemical Company, Melrose Park, Illinois.

17. On or about April 16, 1990, coconspirator Deanna Marie Pierce ordered approximately 8,000 pounds of hydriodic acid solution costing approximately $66,000, from Calabrian, to be picked up during the week of April 23, 1990. This order was later changed to authorize delivery via common carrier on or about May 8, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

18. On or about May 2, 1990, defendant CHARLES WESLEY ARLT deposited approximately $65,770 in United States currency into a bank account at Community National Bank, Friendswood, Texas.

19. On or about May 2, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $65,760 from Community National Bank, Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

20. On or about May 9, 1990, coconspirator Deanna Marie Pierce caused the delivery of approximately 8,000 pounds of hydriodic acid solution to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

21. On or about June 26, 1990, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of San Bernardino, San Bernardino, California, in the amount of $35,000, made payable to AAA Minerals, with the purchaser listed as "OMNI MINING -- C.W. ARLT."

Resp. App. 156a

22. On or about June 28, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000, from Calabrian, to be delivered on or about July 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

23. On or about June 28, 1990, coconspirator Deanna Marie Pierce caused a cashier's check in the amount of $35,000, with the purchaser listed as "OMNI MINING -- C.W. ARLT," to be delivered to Calabrian, in payment for 4,000 pounds of hydriodic acid.

24. On or about July 7, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

25. On or about July 16, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,800 pounds of hydriodic acid solution costing approximately $34,080, from Calabrian, to be delivered on or about July 21, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

26. On or about July 16, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $45,000 from Bank of San Bernardino, San Bernardino, California to a bank account at Texas Commerce Bank controlled by coconspirator Deanna Marie Pierce.

27. On or about July 16, 1990, Deanna Marie Pierce wire transferred approximately $34,637 from a bank account at Texas

Resp. App. 157a

Commerce Bank to Calabrian's bank account at National Westminster Bank, New Jersey.

28. On or about July 25, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 4,800 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

29. On or about August 1, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,800 pounds of hydriodic acid solution costing approximately $34,080 plus shipping from Calabrian, to be ready for delivery on or about August 8, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

30. On or about August 1, 1990, defendant CHARLES WESLEY ARLT deposited approximately $39,007 in United States currency into a bank account at the Bank of San Bernardino.

31. On or about August 1, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $35,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark, Texas, controlled by coconspirator Deanna Marie Pierce.

32. On or about August 2, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $34,637 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

33. On or about August 8, 1990, defendant CHARLES WESLEY ARLT purchased Highland Towing Company, 27110 East Third Street, San Bernardino, California.

Resp. App. 158a

34. On or about August 10, 1990, coconspirator James Eli Wren rented unit A-19 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

35. On or about August 21, 1990, defendant CHARLES WESLEY ARLT ordered 700 pounds of red phosphorous costing $2,975, from Great Lakes Chemical Company, Melrose Park, Illinois.

36. On or about August 21, 1990, coconspirator James Eli Wren deposited $10,605 in United States currency into a bank account at the Bank of San Bernardino.

37. On or about August 21, 1990, coconspirator James Eli Wren wire transferred approximately $2,975 from a bank account at the Bank of San Bernardino to Great Lakes Chemical Company's bank account in Melrose Park, Illinois.

38. On or about August 27, 1990, coconspirator Deanna Marie Pierce ordered approximately 9,600 pounds of hydriodic acid solution costing approximately $67,200 plus shipping from Calabrian, to be delivered on or about September 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

39. On or about August 27, 1990, coconspirator James Eli Wren deposited approximately $71,000 in United States currency into a bank account at the Bank of San Bernardino.

40. On or about August 27, 1990, coconspirator James Eli Wren wire transferred approximately $71,000 from a bank account at the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

Resp. App. 159a

41. On or about August 27, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $68,315 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

42. On or about August 30, 1990, defendant CHARLES WESLEY ARLT took delivery of approximately 700 pounds of red phosphorous at a warehouse facility located at 422-A East Rialto Avenue, San Bernardino, California.

43. On or about September 8, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 9,600 pounds (sixteen 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

44. On or about September 14, 1990, defendant CHARLES WESLEY ARLT purchased, with $130,000 in United States currency, a 160-acre parcel of property in Osceola, Nevada, commonly known as the Old Marriott Ranch.

45. On or about October 8, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about October 15, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

46. On or about October 10, 1990, coconspirator James Eli Wren deposited $42,600 in United States currency into a bank account at the Bank of San Bernardino.

47. On or about October 10, 1990, coconspirator James Eli Wren wire transferred approximately $38,000 from the Bank of San

Resp. App. 160a

Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

48. On or about October 10, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,021 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

49. On or about October 15, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

50. On or about November 5, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about November 12, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

51. On or about November 5, 1990, coconspirator James Eli Wren deposited approximately $40,000 in United States currency into a bank account at the Bank of San Bernardino.

52. On or about November 5, 1990, coconspirator James Eli Wren wire transferred approximately $40,000 to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

53. On or about November 5, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

Resp. App. 161a

54. On or about November 11, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

55. On or about November 8, 1990, coconspirator James Eli Wren purchased a cashier's check with United States currency in the amount of $200,000, made payable to defendant CHARLES WESLEY ARLT.

56. On or about November 9, 1990, defendant CHARLES WESLEY ARLT endorsed a $200,000 cashier's check and delivered it to Unibank, New York, depositing the funds into a bank account there.

57. On or about November 9, 1990, defendant CHARLES WESLEY ARLT instructed Unibank, New York, to forward $200,000 to a bank account at Unibank, Luxembourg controlled by defendant CHARLES WESLEY ARLT and two other coconspirators.

58. On or about November 27, 1990, another coconspirator deposited $47,069 in United States currency into a bank account at the Bank of San Bernardino.

59. On or about November 27, 1990, another coconspirator wire transferred approximately $40,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

60. On or about November 28, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $36,981, from Calabrian, to

Resp. App. 162a

be delivered "as soon as possible" to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

61. On or about November 28, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

62. On or about November 29, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503, from Calabrian, to be delivered on or about December 3, 1990, to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

63. On or about December 2, 1990, coconspirator James Eli Wren rented unit A-10 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

64. On or about December 3, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

65. On or about December 3, 1990, defendant CHARLES WESLEY ARLT purchased the following ammunition at a sporting goods store in Ely, Nevada: two boxes of .38 caliber ammunition, four boxes of .44 magnum ammunition, two boxes of .30 caliber carbine ammunition, four boxes of shotgun shells, and two boxes of .380 ammunition.

66. On or about December 14, 1990, coconspirator Deanna Marie Pierce changed her order of November 29, 1990 with

Resp. App. 163a

Calabrian from 5,216 pounds to approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, to be shipped to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

67. On or about December 14, 1990, coconspirator James Eli Wren wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

68. On or about December 14, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $73,962 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

69. On or about December 20, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

70. On or about January 7, 1991, defendant CHARLES WESLEY ARLT instructed and caused defendant James Eli Wren to purchase One Piper Cherokee 6 Airplane, model no. PA32-260 (1968), serial no. S-32-1067, in the name Payback Mines, for $32,000.00 U.S. currency, contained in a brown paper bag.

71. On or about January 20, 1991, defendant CHARLES WESLEY ARLT instructed and caused James Eli Wren to purchase one Bell 47 G-2 helicopter, U.S. Registration number N59H, in the name of Payback Mines, with $65,000.00 in U.S. currency contained in a briefcase.

Resp. App. 164a

72. On or about January 25, 1991, coconspirator Deanna Marie Pierce ordered approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, from Calabrian, to be delivered on or about January 30, 1991, to the Consolidated Freightways terminal, San Bernardino County, California.

73. On or about January 25, 1991, coconspirator James Eli Wren deposited $80,000 in United States currency into a bank account at the Bank of San Bernardino.

74. On or about January 25, 1991, coconspirator James Eli Wren wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

75. On or about January 25, 1991, coconspirator Deanna Marie Pierce wire transferred approximately $73,962 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

76. On or about January 30, 1991, coconspirators James Eli Wren and James Rocky Hill purchased Stormy Seas Four (a shrimp boat), official number 2159, in the name of Payback Mines with $51,700.00 U.S. currency, contained in a briefcase.

77. On or about February 2, 1991, at an auction, defendant CHARLES WESLEY ARLT and coconspirators James Eli Wren, James Rocky Hill, and Regina Wren purchased eleven vehicles and one boat, in the name of Payback Mines, for $105,000.00 U.S. currency.

78. On or about February 5, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216

Resp. App. 165 a

pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

79. On or about February 8, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped by Calabrian to AAA Minerals.

80. On or about February 12, 1991, coconspirator James Eli Wren distributed two 55-gallon drums of hydriodic acid solution in the parking lot of the Comfort Inn, San Bernardino, California.

81. On or about February 12, 1991, coconspirator Deanna Marie Pierce ordered approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution costing approximately $74,453, from Calabrian, to be delivered "as soon as possible" to the Consolidated Freightways terminal, San Bernardino County, California.

82. On or about February 12, 1991, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren deposited approximately $80,000 in United States currency into a bank account at the Security Pacific National Bank, San Bernardino, California.

83. On or about February 12, 1991, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren wire transferred approximately $80,000 from the Security Pacific National Bank to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

Resp. App. 166a

84. On or about February 13, 1991, following several seizures by law enforcement officers of methamphetamine, chemicals and equipment used in the manufacture of methamphetamine, and large quantities of United States currency, coconspirator Deanna Marie Pierce telephoned Calabrian and requested that her order of 10,432 pounds of hydriodic acid solution be placed "on hold," stating that there had been "an accident in the mines."

85. On or about February 19, 1991, coconspirator James Rocky Hill arranged for the delivery of approximately 3,000 pounds of red phosphorous to defendant Daryle Eugene House at 56024 Tracy Boulevard, Yucca Valley, California.

86. On or about February 20, 1991, defendant Daryle Eugene House took delivery of approximately 3,000 pounds of red phosphorous at his residence located at 56024 Tracy Boulevard, Yucca Valley, California.

87. On or about February 20, 1991, coconspirator James Rocky Hill arranged for the transport of the approximately 3,000 pounds of red phosphorous to a remote mine site near Daggett, California.

88. On or about February 21, 1991, coconspirator James Eli Wren transported in excess of $123,000 in United States currency from Security Pacific National Bank, San Bernardino, California, to Mayhill Bail Bonds, San Bernardino, California.

89. On or about February 22, 1991, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of America in the amount of $200,000, made payable to Unibank.

Resp. App. 167a

90. On or about March 20, 1991, defendant ARLT transferred $405,095.19 from his bank account in Luxembourg, through Unibank in New York, to savings account 315-339-081 in the name of James Hill, at Security Pacific National Bank, Rubidoux Branch, 5694 Mission Boulevard, Riverside, California.

91. On or about March 21, 1991, coconspirator James Rocky Hill made arrangements with Security Pacific National Bank to withdraw $400,000 in United States currency from his savings account on March 29, 1991.

92. On or about March 29, 1991, coconspirator James Eli Wren possessed approximately $8,929.93 in U.S. currency in the following accounts: Bank of America account 01963-04647 in the name of James Eli Wren; Bank of America account 01969-04649 in the name of James Eli Wren; and Bank of America account 01964-04854 in the name of Payback Mines.

93. On or about March 29, 1991, coconspirator James Eli Wren stored approximately one hundred thirty-eight (138) silver bars, weighing approximately 13,500 ounces, at Mayhill Bail Bonds.

94. On or about March 29, 1991, defendant Daryle Eugene House possessed formulas detailing methods of manufacturing methamphetamine at his residence located on Tracy Boulevard in Yucca Valley, California.

95. On or about March 29, 1991, defendant CHARLES WESLEY ARLT and coconspirators Daryle Eugene House and Robert Kuhnle possessed a formula detailing a method of manufacturing methamphetamine at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

Resp. App. 168a

96. On or about March 29, 1991, defendant CHARLES WESLEY ARLT and coconspirators Daryle Eugene House and Robert Kuhnle possessed approximately 41 firearms at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

97. On or about March 29, 1991, defendant CHARLES WESLEY ARLT, and coconspirators Daryle Eugene House and Robert Kuhnle possessed hydriodic acid at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

98. On or about March 29, 1991, defendant CHARLES WESLEY ARLT possessed approximately 29 110-pound containers of red phosphorous on a mine site located in a remote area near Daggett, California.

As a result of the offense alleged in this count, defendant CHARLES WESLEY ARLT shall forfeit to the United States any and all property constituting or derived from any proceeds that said defendant obtained directly and indirectly as a result of the said violation, and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violation alleged herein, including but not limited to the following:

1. $405,748.61 U.S. currency, consisting of $405,095.19 transferred by defendant ARLT on or about March 20, 1991 from his bank account in Luxembourg, through Unibank in New York, to Security Pacific account 315-339-081 in the name of James Hill, plus interest accruing thereon from March 20 through March 29, 1991;

Resp. App. 169a

2. $8,929.93 U.S. currency, seized from Bank of America account 01963-04647 in the name of Jim Wren, Bank of America account 01969-04649 in the name of Jim Wren, and Bank of America account 01964-04854 in the name of Payback Mines;

3. $123,000.00 U.S. currency, found in a box at Mayhill Bail Bonds during execution of a search warrant on March 29, 1991;

4. One Bell 47 G-2 helicopter, U.S. Registration number N59H, purchased by James Eli Wren in the name of Payback Mines on January 20, 1991, with $65,000.00 in U.S. currency contained in a briefcase;

5. Stormy Seas Four (shrimp boat), official number 2159, purchased by James Eli Wren and James Rocky Hill in the name of Payback Mines on or about January 30, 1991, with $51,700.00 U.S. currency, contained in a briefcase;

6. One Piper Cherokee 6 Airplane, model no. PA32-260 (1968), serial no. S-32-1067, purchased by James Eli Wren in the name Payback Mines on or about January 7, 1991, for $32,000.00 U.S. currency, contained in a brown paper bag;

7. One hundred thirty-eight (138) silver bars, seized at Mayhill Bail Bonds during execution of a search warrant on March 29, 1991;

8. The following eleven vehicles and one boat, purchased at an auction by defendant CHARLES WESLEY ARLT, James Eli Wren, James Rocky Hill, and Regina Wren, in the name of Payback Mines, for $105,000.00 U.S. currency:

a. One 1985 Jaguar, VIN: SAJNV5842FC119348;

Resp. App. 170a

b. One 1981 Wellcraft, VIN: HALLWELT1593G788;

c. One 1988 Jaguar, VIN: SAJHU1643JC530324;

d. One 1986 Porsche, VIN: WPOAAO940GN454897;

e. One 1988 Jaguar, VIN: SAJAV1643JC521364;

f. One 1986 Chevrolet, VIN: 1G8CS18RXG0140772;

g. One 1988 Mitsubishi, VIN: JA7FL24D9JP050914;

j One 1987 Nissan, VIN: JN6ND11S3HW033709;

i One 1987 Suzuki, VIN: 1S4JC51C2H4154485;

j One 1988 Jeep, VIN: 2BCHV8157JB523469;

k. One 1988 Chevrolet, VIN: 1GCFC24KOJZ253793;

l. One 1983 Chevrolet, VIN: 1G8CS18B9D8132968.

If any of the above-described forfeitable property, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

Resp. App. 171a

COUNT TWO

[18 U.S.C. §§ 371, 1956(a)(1)]

I. OBJECT OF THE CONSPIRACY

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within the Central District of California and elsewhere, defendant CHARLES WESLEY ARLT, and coconspirators James Eli Wren, Deanna Marie Pierce, James Rocky Hill, and others both known and unknown to the Grand Jury, knowingly and willfully conspired and agreed with each other to commit the following offense against the United States:

1. To knowingly and intentionally launder monetary instruments, in violation of Title 18, United States Code, Sections 371 and 1956(a)(1).

II. MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED

The object of the conspiracy was to be accomplished in substance as follows:

1. The means alleged in Count One of this indictment, as set forth at paragraphs 1 to 8 of the means relating to Count One, are incorporated herein by reference and alleged as the means of this count.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendant CHARLES WESLEY ARLT, and coconspirators James Eli Wren, Deanna Marie Pierce, James Rocky Hill, and others both known and unknown to the Grand Jury, committed various overt acts within the Central District

Resp. App. 172a

of California and elsewhere, including but not limited to the following:

1. The overt acts alleged in Count One of this indictment, as set forth at paragraphs 1 through 98 of the overt acts relating to Count One, are incorporated herein by reference and are alleged as overt acts 1 to 98 of this count.

Resp. App. 173a

COUNTS THREE AND FOUR

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT provided United States currency to Deanna Marie Pierce, who in turn wire transferred the amounts listed below from bank accounts in Texas to Calabrian International, Inc.'s bank account at National Westminster Bank in New Jersey. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Resp. App. 174a

COUNT	DATE	WIRE TRANSFER TO CALABRIAN FROM	AMOUNT
3	July 16, 1990	Texas Commerce Bank	$34,637
4	August 2, 1990	First Bank of Deerpark	$34,637

Resp. App. 175a

COUNTS FIVE THROUGH NINE

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT provided United States currency to Deanna Marie Pierce, who in turn wire transferred the amounts listed below from a bank account at the First Bank of Deerpark in Texas to Calabrian International, Inc.'s bank account at National Westminster Bank in New Jersey. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Resp. App. 176a

COUNT	DATE	AMOUNT
5	August 27, 1990	$68,315
6	October 10, 1990	$36,021
7	November 5, 1990	$36,981
8	December 14, 1990	$73,962
9	January 25, 1991	$73,962

Resp. App.
177a

COUNTS TEN AND ELEVEN

[18 U.S.C. § 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT wire transferred the amounts of United States currency listed below from bank accounts at the Bank of San Bernardino, within the Central District of California, to bank accounts in Texas controlled by Deanna Marie Pierce. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Resp. App. 178a

COUNT	DATE	AMOUNT
10	July 16, 1990	$45,000
11	August 1, 1990	$35,000

Resp. App.
179a

COUNTS TWELVE THROUGH SEVENTEEN

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured and caused James Eli Wren to conduct financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that James Eli Wren wire transferred the amounts of United States currency listed below from bank accounts at banks within the Central District of California to bank accounts in Texas controlled by Deanna Marie Pierce. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Resp. App. 180a

COUNT	DATE	BANK FROM WHICH FUNDS WERE TRANSFERRED	AMOUNT
12	August 27, 1990	Bank of San Bernardino	$71,000
13	October 10, 1990	Bank of San Bernardino	$38,000
14	November 5, 1990	Bank of San Bernardino	$40,000
15	December 14, 1990	Bank of San Bernardino	$80,000
16	January 25, 1991	Bank of San Bernardino	$80,000
17	February 12, 1991	Security Pacific National Bank	$80,000

Resp. App. 181a

COUNT EIGHTEEN

[18 U.S.C. § 1956(a)(1)]

On or about June 26, 1990, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of approximately $35,000 at the Bank of San Bernardino, within the Central District of California, to be used for the purchase of chemicals from Calabrian International, Inc. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

Resp. App. 182a

COUNT NINETEEN

[18 U.S.C. § 1956(a)(1)]

On or about February 22, 1991, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of $200,000 at the Bank of America. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

A TRUE BILL

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Foreperson

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Chief, Narcotics Section

Resp. App.
183a